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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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SERV-A-PORTION, INC.,
and
DI GIORGIO CORPORATION,

*Petitioners,*

v.

J.F. FEESER, INC., and
JUNIATA FOODS, INC.,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. Whether evidence of "injury" to a single competitor, in the form of a few scattered lost sales in a healthy, vibrant and growing industry, satisfies the statutory mandate of § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), that in order for a price differential to be unlawful it must tend to "injure, destroy, or prevent competition."

2. Whether a purchaser is automatically entitled to an award of damages under § 4 of the Clayton Act, 15 U.S.C. § 15(a), when the only evidence of injury is a small difference in price and a few lost sales for which there is no causal link to defendant's alleged actions.

3. Whether this Court's summary judgment standards may be ignored in Robinson-Patman Act cases so that summary judgment can be denied despite the inability of plaintiff to offer admissible, unambiguous evidence of essential elements of its claim.

## PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Weis Markets, Inc. was a party to this case in the court below.* Pursuant to Rule 29.1 of the Rules of this Court, the following is a statement of all parent companies and non-wholly owned subsidiaries of petitioners: Di Giorgio Corporation is the successor to Serv-A-Portion, Inc.; DIG Holdings, Inc. owns 100% of Di Giorgio Corporation; and Di Giorgio Corporation has no non-wholly owned subsidiaries.

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* The court below named Hunt-Wesson Foods, Inc., Mark Crane and Sky Brothers as appellees in its caption. Hunt-Wesson, a defendant in the district court, settled the completely unrelated claims asserted against it before the appeal was filed. Neither Mr. Crane nor Sky Brothers are parties in this case. Mr. Crane was a court-appointed mediator and Sky Brothers merely moved in the district court to quash third-party discovery served on it.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit which reversed the decision of the United States District Court for the Middle District of Pennsylvania granting summary judgment in favor of petitioners against all of respondents' claims.

## OPINIONS AND ORDERS BELOW

The August 2, 1990 opinion of the Court of Appeals for the Third Circuit is reported at 909 F.2d 1524 and reproduced in Appendix ("App.") A, *infra*, 1a-50a. The Court of Appeals' September 19, 1990 orders amending the judgment and denying rehearing and rehearing *en banc* are unreported and reproduced in App. B, *infra*, 51a-52a, and App. C, *infra*, 53a, respectively. The August 4, 1989 opin-

ion and judgment of the district court granting summary judgment are unpublished and reproduced in App. D, *infra*, 54a-88a, and App. E, *infra*, 89a-90a.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1990. A timely petition for rehearing was denied on September 19, 1990. An extension of time (until January 17, 1991) to file this Petition was granted on December 10, 1990. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved in this case, § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), and § 4 of the Clayton Act, 15 U.S.C. § 15(a), are reproduced in App. F, *infra*, 91a.

## STATEMENT OF THE CASE

### A. Statement Of Facts

This is an action for damages for alleged price discrimination under § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a).[1] Respondents, J.F. Feeser, Inc. and Juniata Foods, Inc. (collectively "Feeser"), are Pennsylvania food service distributors who sold thousands of products, among them certain portion-controlled condiments then manufactured by petitioner Serv-A-Portion, Inc.,[2] a former subsidiary of petitioner Di Giorgio Corporation (collectively "Serv"), to

[1] The Third Circuit held that Feeser's injunctive relief claims under § 2(a) were moot because Feeser conceded that any alleged discrimination ended by 1987. App. A, 15a.

[2] The products at issue were sold under the Serv label. Serv products are single-serving packets of a variety of condiments such as ketchup, mustard, various relishes, taco sauce, mayonnaise and powdered cream.

Di Giorgio Corporation sold certain of its Serv assets effective May 31, 1988, to Borden, Inc.

institutional purchasers such as coffee shops, diners and fast-food restaurants. Feeser complained that Serv engaged in price discrimination by selling these products to another distributor, Weis Food Service ("Weis"), at prices lower than those charged to Feeser. The result of this alleged discrimination, Feeser claims, was "substantially [to] lessen competition among distributors of institutional food products [and to cause] injury to [Feeser's] business and property."[3]

Discovery conducted by petitioners of the factual predicate for Feeser's claims, however, established that neither Feeser nor the market in which it competed was injured by any Serv pricing practice. The uncontradicted evidence demonstrated that Feeser itself thrived from 1983 to 1986, the period of the alleged price discrimination. Specifically, during that period:

- Feeser increased its gross sales more than 112%, exceeding the average sales growth by distributors both nationwide and in Pennsylvania (*see* App. G, *infra*, 92a);[4]
- Feeser's pre-tax profits almost tripled (increasing 179%) (*see* App. G, 93a);[5]
- Feeser grew to become one of the "Top 50" institutional food service distributors in the United States;[6]

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[3] *See* Amended Complaint at ¶¶ 14, 15, 16 (A.I-83-84). (All references to record evidence preceded by "A." are to the volume and page number of the Joint Appendix filed with the Court of Appeals below.) During the alleged discrimination period, Serv customers included Feeser and Weis Food Service, a division of defendant Weis Markets Inc. *See* Amended Complaint at ¶¶ 7, 14 (A.I-81, 83). Serv never sold Serv products to respondent Juniata Foods, Inc. ("Juniata"). Juniata purchased its Serv products from J.F. Feeser, Inc.

[4] *See also* Corrected Larner Affidavit at Exhibit D (A.V-2796); Supplemental Cruise Declaration at ¶¶ 3-4 (A.IX-4882-4883).

[5] *See also* Serv Exhibit 1 (A.II-763-822).

[6] *See* Karas Declaration (June 10, 1988) at ¶ 32 (A.III-948-949). Feeser does not contest this fact or others in this section; it only challenged one paragraph from one of Mr. Karas' two declarations, and that challenge was not ruled upon by the district court. App. D, 87a. Therefore, the testimony of Mr. Karas is uncontradicted and unrebutted in this case.

• Feeser increased its net purchases of Serv products by 85%, more than the Pennsylvania and national averages;[7] and

• Feeser took business, *including Serv business*, away from its competitors—including the allegedly favored buyer Weis—at some 80 accounts.[8]

These accomplishments came within a flourishing market. It is uncontested that from 1983 to 1986, 35 new food distributors entered the Pennsylvania food distribution market,[9] total sales by all Pennsylvania food distributors rose 54%,[10] and their purchases of Serv products increased by approximately 50%.[11] This growth by Pennsylvania food distributors, including the segment attributable to Serv products, exceeded the corresponding averages of distributors nationwide.[12]

The uncontradicted evidence demonstrated that Feeser was not the victim of any substantial or prolonged difference in Serv pricing. For example:

• Feeser conceded that, at times, it was the favored Serv customer, often receiving better prices from Serv than did the allegedly favored distributor;[13]

• An analysis produced by Feeser[14] of the discrimination it allegedly suffered revealed an average yearly price dif-

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[7] *See* Corrected Larner Affidavit at Exhibit D (A.V-2796); Supplemental Cruise Declaration (October 3, 1988) at ¶¶ 3-4 (A.IX-4882-4883).

[8] *See* R. Miller Deposition at p. 71 (A.III-1436); Bowers Declaration at ¶ 6 (A.III-1221-1222); Fuller Deposition at pp. 250, 258, 260, 267 (A.III-1367, 1370-1372); Blew Deposition at pp. 47-48 (A.III-1303-1304).

[9] *See* Supplemental Karas Declaration (October 5, 1988) at ¶ 9 (A.VIII-4445).

[10] *See* Supplemental Karas Declaration at ¶ 8 (A.VIII-4444).

[11] *See* Supplemental Cruise Declaration at ¶ 4 (A.IX-4883).

[12] *See* Supplemental Karas Declaration at ¶¶ 7-8 (A.VIII-4444); Supplemental Cruise Declaration at ¶¶ 3-4 (A.IX-4882-4883).

[13] *See* Corrected Larner Affidavit at Exhibit B (A.V-2790).

[14] *See* Larner Affidavit (August 29, 1986) and Exhibits thereto. (A.XI-6384-6497).

ferential between Feeser and Weis that represented less than .03% of Feeser's total purchases, .025% of its gross sales, and .06% of its pre-tax profits for 1986;[15]

• During 1985, the average difference in the price of Serv products sold to Feeser and those sold to Weis amounted to only *$.002 per case*.[16]

Finally, despite the benefit of the evidentiary inferences granted the nonmovant on summary judgment, Feeser was at most able to show lost sales at only 18 of its 3,000 accounts, approximately 1/2 of 1%.[17] At the same time, Feeser gained about four accounts for every one it allegedly lost, including accounts won from an allegedly favored distributor, Weis.[18]

### B. The District Court Opinion

Serv moved for summary judgment against Feeser's Robinson-Patman Act claim on grounds that Feeser could show neither injury to competition nor antitrust injury to

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[15] Feeser's cost of sales for 1986 amounted to $48,688,101. Its gross revenues for that year were $56,515,754 and its pre-tax profit was $2,249,018. *See* Serv Exhibit 1 (A.II-763-822).

[16] According to Feeser's analysis, (A.XI-6384-6497), the aggregate price difference—for all products, for all of 1985—between those sold to Feeser and those sold to Weis was $105.82. This was calculated by determining the difference between the price of a case of each product sold to Feeser and Weis, multiplying this difference by the number of cases Feeser bought of each product and then aggregating the sums. When aggregated, Feeser purchased 53,991 cases of Serv products that year at an average price difference of less than $.002 per case. A case contains hundreds of packets.

[17] *See* App. D, 62a-66a.

[18] This equals 80 accounts gained. *See* note 8, *supra*, and accompanying text. Because Feeser could only allege 86 instances of lost sales, *see* Plaintiffs' Supplemental Response to Serv's Third Set of Interrogatories No. 13 (A.IV-1595-1599), Feeser's lawsuit is, at best, about a net loss of 6 accounts.

itself.[19] The district court granted Serv's motion in its entirety, finding that Feeser's evidence was insufficient to withstand summary judgment under the standards established by recent decisions of this Court such as *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).[20] (App. D, 55a, 87a.)

The district court's opinion contained a systematic examination of Feeser's evidence. (App. D, 60a-78a.) That evidence included deposition testimony, affidavits, affirmations and an expert report that purported to show injury as well as the degree and duration of the alleged price discrimination. The district court rejected much of this evidence as speculative, conclusory, incomplete, and not based upon knowledge. (*See, e.g.*, App. D, 60a-61a, 64a, 68a, 69a-78a.) The court concluded that, taken as a whole, Feeser's admissible evidence was insufficient for a reasonable jury to find injury either to Feeser or to competition.

### C. The Third Circuit Opinion

On appeal, the Third Circuit reversed and vacated the district court's grant of summary judgment. Despite the fact that § 2(a) of the Robinson-Patman Act requires a showing of injury to competition, the court began with the conclusion that evidence of injury to a single competitor may satisfy this competitive injury requirement. (App. A, 21a-22a.) The court below next found that Feeser's showing of lost sales and profits, derived from the submissions

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[19] Serv also moved for summary judgment against Feeser's claims under the Sherman Act and Pennsylvania common law, as each was derived exclusively from the Robinson-Patman allegations. In light of the undisputed facts evidencing the absence of competitive injury and any agreement in restraint of trade, the district court found Feeser had also not produced admissible evidence sufficient for a jury to find in its favor on the Sherman Act claim. The related summary adjudication of the Robinson-Patman and Sherman Act claims removed the basis for pendent jurisdiction of Feeser's common law state claims.

[20] *See also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

the district court found to be inadmissible and/or non-probative, was sufficient evidence of competitive injury to defeat summary judgment. (App. A, 27a.) It did so despite its recognition that "de minimis violations are *not* actionable" under the Robinson-Patman Act. (App. A, 33a.) The Court of Appeals did not consider Feeser's competitive successes, increased Serv sales, nor any facts concerning the vigorous competitive health in the Pennsylvania food service market.

The Court of Appeals also held that sufficient evidence of competitive injury could be found by virtue of an inference analysis dependent upon substantial price differences existing over time. (App. A, 30a-31a.) The Court of Appeals apparently assumed that Feeser was charged higher prices than Weis throughout the four-year period in question, (App. A, 30a.), despite its recognition that Feeser at times received better prices on Serv products than did Weis. (App. A, 41a.)

Finally, in considering the separate requirement that a plaintiff establish actual antitrust injury to itself under § 4 of the Clayton Act, the Court of Appeals concluded that actual injury could arise merely from evidence of a slight price differential and a small number of lost sales. (App. A, 32a-33a.) The court did not require proof of a causal connection between Serv's alleged prices and Feeser's alleged injury. (App. A, 32a-33a.)

Thus, the Third Circuit concluded that Feeser had met its burden in opposing Serv's motion for summary judgment.[21] In so doing, it effectively eliminated the independent requirement of injury to competition and the

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[21] The Third Circuit also reversed the district court with respect to its dismissal of the Sherman Act and Pennsylvania common law causes of action. Serv does not seek this Court's review of the Court of Appeals' decision as it relates to these claims, although a reversal of the Third Circuit opinion respecting the Robinson-Patman Act claim should require that the decision respecting these other claims be reconsidered.

requirement of proof of a causal connection between a defendant's pricing and a plaintiff's damages.

## REASONS FOR GRANTING THE WRIT

Judicial interpretations of the Robinson-Patman Act have become a veritable Tower of Babel. The conflicts among the courts enforcing it have led to a proliferation of litigation and a morass of irreconcilable case law. Judicial interpretations and applications of the Act have intolerably "increase[d] . . . the uncertainty inherent in the generalities of the Robinson-Patman Act." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 570 (1981) (Powell, J., concurring in part and dissenting in part, joined by Brennan, Marshall and Blackmun, JJ.).

The decision of the Third Circuit in this case illustrates the inconsistency and confusion that have become synonymous with judicial enforcement of the Robinson-Patman Act. The issues presented by this case go to the heart of the Act and are at the very center of the controversy among the courts over its meaning and enforcement.

The first issue concerns the competitive injury requirement of the Robinson-Patman Act. Despite uniform agreement that a showing of competitive injury is a condition precedent to establishing a violation of § 2(a) of the Act, courts are at odds over what constitutes competitive injury. As the Eleventh Circuit has recognized, "A controversy has raged (and continues to rage) over the meaning of the word 'competition' as used in the so-called 'competitive injury' phrase of Section 2(a) [of the Act]. . . . The word 'competition' as generally used in the antitrust laws seems capable of meaning different things to different people and, according to one commentator, can be interpreted in at least five ways." *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6 (11th Cir. 1990). Professor Rowe characterizes this conflict as "perennial." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 126 (1962). The FTC itself recently acknowledged that, "[t]here are at least four approaches to assessing [competitive] in-

jury" under the Act. *Boise Cascade Corp.*, 5 Trade Reg. Rep. (CCH) (1990-2 Trade Cas.), ¶ 22,902 at 22,584 (FTC Nov. 1, 1990) (opinion by FTC on remand).

The standard applied by the Third Circuit in this case is inconsistent with decisions in the Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits.[22] The Third Circuit's rule, that injury to competition may be established by showing injury to a single competitor, will compel lower courts to protect individual competitors by finding competitive injury in Robinson-Patman cases even though the business of the industry as a whole and the plaintiff in particular were flourishing. In effect, the court below applied the Robinson-Patman Act as if it were a *per se* statute that is violated any time there exists the slightest difference in price between one purchaser (regardless of how large and successful it might be) and another, irrespective of the competitive impact of the price differential.

This Court has never intimated that the Robinson-Patman Act should be enforced in the face of uncontradicted evidence establishing an absence of competitive injury, yet that is exactly what the Third Circuit has done. The result is an inflexible and "doctrinaire interpretation" of the Robinson-Patman Act of the kind that has been rejected by this Court. *See Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1138 (D.C. Cir. 1988) (citing *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63 (1961)).

The second issue presented in this case concerns what constitutes antitrust injury under § 4 of the Clayton Act. While proof of a § 2(a) violation establishes that injury might occur, it does not mean that antitrust injury has

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[22] *Compare* this case *with, e.g., Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988); *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380 (10th Cir. 1985); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575 (5th Cir.) (on remand), *cert. denied*, 459 U.S. 908 (1982).

actually occurred under § 4 of the Clayton Act. *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). In this case, the court below adopted a rule of automatic damages that allows an inference of antitrust injury from the simple fact of a price difference coupled with a few lost sales. The Third Circuit's opinion will permit courts to award damages absent evidence of causation, or proof that a defendant's actions actually caused injury.

As a result, the Third Circuit has adopted a standard for determining antitrust injury under the Clayton Act that conflicts with the decisions of this Court and several circuits.[23] More importantly, it has embraced a test for determining damages under § 4 of the Clayton Act that was clearly rejected by this Court a decade ago in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981). In doing so, it has ignored the standards for summary judgment that have been established by this Court.

Certiorari should be granted in this case so that a clear, coherent and consistent approach to enforcement of the Robinson-Patman Act and the Clayton Act may be articulated by this Court and so that the conflicts among the circuits created by the Third Circuit in this case can be eliminated. Unless this Court grants certiorari to review the erroneous legal doctrine applied by the Third Circuit, litigation will proliferate as plaintiffs who seek recourse from the impact of lawful competitive pricing will seek to use the Robinson-Patman Act as both a shield and a sword, turning "the Robinson-Patman Act into a font of tort law for battered businesses." *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1341 (8th Cir. 1987). Consumers will also suffer as price rigidity will be encouraged. Summary judgment will become unattainable in Robinson-Patman cases as there will be no incentive for district courts to undertake the

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[23] *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir.) (on remand), *cert. denied*, 459 U.S. 908 (1982).

substantial effort required to manage antitrust cases or to use summary judgment as an effective means to manage their caseloads.

### A. This Court Should Grant Certiorari To Avoid The Creation Of Separate Standards Under The Robinson-Patman Act And Other Antitrust Laws And To Resolve The Conflict Among The Circuits Over The Appropriate Standard For Determining The Element Of Competitive Injury Under § 2(a) Of The Act.

The Third Circuit has adopted a rule for "competitive injury" in price discrimination cases brought under § 2(a) of the Robinson-Patman Act that, by converting the Act into a *per se* statute, poses an affirmative threat to competition and national competition policy. The Third Circuit's rule cannot be reconciled with the decisions of this Court or those of the Fifth, Seventh, Eighth, Ninth, Tenth and D.C. Circuits.[24] Review is necessary to provide uniformity and to prevent undermining effective enforcement of the Robinson-Patman Act.

1. The purpose of the antitrust laws, clearly and repeatedly articulated by this Court, is to protect competition, not individual competitors. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). The Robinson-Patman Act is no exception.

This Court has recognized that there is a danger that the Robinson-Patman Act will be misread to run contrary to the competitive process. *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 n.15 (1951) ("It has been suggested that, in theory, the Robinson-Patman Act as a whole is inconsistent with the Sherman and Clayton Acts."). Because improper application of the Act can result in stifling competition and encouraging anticompetitive price uniformity, the Court has warned that the Robinson-Patman Act must be construed in harmony with the remainder of the antitrust laws, lest Robinson-Patman "give rise to a price

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[24] *See* cases cited in note 22, *supra*, and note 27, *infra*.

uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80 (1979) (citing *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63 (1953)).

In keeping with these directives, the Seventh, Eighth, Ninth, and Tenth Circuits,[25] as well as district courts in the Third Circuit,[26] do not permit a plaintiff to prove competitive injury by pointing to his own dissatisfaction with a pricing pattern. Rather, to prevail, a plaintiff must point to competitive failure in the market. For example, the Ninth Circuit has held that:

> Although [section 2(a) of] the Robinson-Patman Act is a prophylactic statute which should be construed broadly, consistent with the policies of the antitrust laws [citation omitted], neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition.
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> The naked demonstration of injury to a specific competitor without more is not sufficient to show that a price discrimination 'may' substantially lessen competition; the test must always focus on injury to *competition*.

*Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *accord Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) ("The Act refers not to the effect upon competitors, but to the effect upon competition in general. That is, analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business, regard-

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[25] *See* cases cited in note 22, *supra*, and note 27, *infra*.

[26] *M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387 (W.D. Pa. 1988); *Double H. Plastics, Inc. v. Sonoco Products Co.*, 575 F. Supp. 389 (E.D. Pa. 1983), *aff'd*, 732 F.2d 351 (3d Cir.), *cert. denied*, 469 U.S. 900 (1984).

less of which competitor wins or loses."); *American Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963) ("The statute's concern with the individual competitor is but incidental."), *cert. denied*, 377 U.S. 954 (1964); *see Henry v. Chloride, Inc.*, 809 F.2d 1334, 1340 (8th Cir. 1987) (the courts of appeals that have considered these issues have "overwhelmingly held" that demonstration of injury to a single competitor is insufficient).[27] Professor Rowe has observed that: "[t]he perennial controversy over the correct application of § 2(a) to avert detrimental effects on *competition*, on the one hand, or on individual *competitors*, on the other, is being resolved, doctrinally, if not actually, toward the protection of competition, in accord with the literal text of the Act." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 126-27 (1962) (emphasis in original).

The Third Circuit itself has previously held that, " 'A focus on detrimental effects *on competition*, rather than a concern with individual *competitors*, is fundamental to a reconciliation of the Robinson-Patman Act with overall antitrust policies.' " *O. Hommel Co. v. Ferro Corp.*, 659 F.2d

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[27] *Accord Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 596-97 (8th Cir. 1987) ("That the antitrust laws are not designed to protect individual competitors from the natural consequences of the competitive process is clear. • • • As this Court previously has observed, 'analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor and health of the contest for business, regardless of which competitor wins or loses' "), *cert. denied*, 484 U.S. 1010 (1988); *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 395 (10th Cir. 1985); *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676 (10th Cir.), *amended*, 732 F.2d 779 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 798-99 (10th Cir.) ("Although [plaintiff] may have been at a disadvantage . . . that does not establish the injury to the health of the competitive process with which the Robinson-Patman Act is concerned."), *cert. denied*, 434 U.S. 879 (1977); *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 846 (D. Minn. 1989); *M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387, 400 (W.D. Pa. 1988); *Double H Plastics, Inc. v. Sonoco Products Co.*, 575 F. Supp. 389, 398 (E.D. Pa. 1983), *aff'd*, 732 F.2d 351 (3d Cir.), *cert. denied*, 469 U.S. 900 (1984).

340, 347 (3d Cir. 1981) (quoting F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 130 (1962)) (emphasis in original), *cert. denied*, 455 U.S. 1017 (1982). Yet, *Hommel* was not even cited in the decision of the court below in this case.[28]

The Third Circuit has now fashioned a rule that loss to an individual competitor is sufficient as a matter of law to meet the competitive injury requirement of § 2(a) of the Act. The court below explicitly held that:

> [t]herefore, we today decide that the statute and its accompanying legislative history, the Supreme Court decision in *Morton Salt* and the recent jurisprudence of Robinson-Patman secondary-line cases compel a holding that evidence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act.

App. A, 21a-22a. The Third Circuit thus joined a handful of lower courts that have rewritten Robinson-Patman to favor an individual competitor over the competitive proc-

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[28] The Robinson-Patman Act itself makes no distinction in the need to prove competitive injury in so-called primary-line cases (where competitors of the seller claim a violation) and secondary-line cases (where an allegedly disfavored purchaser sues its seller for favoring other purchasers). *See* 15 U.S.C. § 13(a). Primary-line cases consistently have interpreted the competitive injury requirement in the Robinson-Patman Act to mean injury to competition. *See, e.g., O. Hommel v. Ferro Corp.*, 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 721 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680 (S.D. Ind. 1988), *aff'd*, 881 F.2d 1396 (7th Cir. 1989). The same rule appropriately has been applied in secondary-line cases. For that reason, petitioners do not limit their discussion in this section to secondary-line cases. If attention were focused only upon such cases, the Third Circuit rule that permits competitive injury to be shown by injury to a single competitor is squarely in conflict with the decisions in secondary-line cases from other circuits. *See, e.g., Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Foremost Pro Color*, 703 F.2d at 548.

ess.[29] *See* App. A, 21a-22a; *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6, 1427 (11th Cir. 1990); *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528-29 (1st Cir. 1989); *Castlegate, Inc. v. National Tea Co.*, 34 F.R.D. 221, 230 (D. Colo. 1963); *H.J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F. Supp. 452, 463-64 (S.D.N.Y. 1960).[30]

These rulings are squarely in conflict with the antitrust enforcement standards of this Court and other courts, and subvert the very purpose of the antitrust laws: the pro-

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[29] While no decision of this Court has dealt directly with the question of what constitutes competitive injury, *see Henry v. Chloride*, 809 F.2d 1334, 1340 (8th Cir. 1987), Professor Rowe has noted: "[t]he doctrinal antinomy between injury to competition and injury to competitors derives from free wheeling dicta in the Supreme Court's *Morton Salt* decision in 1948." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 127 (1962). In *Morton Salt*, the Court observed that, in passing Robinson-Patman, Congress was especially concerned with protecting small businesses unable to buy in quantity. *FTC v. Morton Salt Co.*, 334 U.S. 37, 49 (1948). The Court cited a committee report that suggested that the Act "was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.' " *Id.* at 49. However, this Court in *Morton Salt* ultimately found that the FTC had demonstrated injury to competition by putting forward 2,000 pages of such evidence. Given this, the Eighth Circuit has recognized:

> These are among the reasons why, as a former FTC chairman and general counsel has noted, "[f]or the most part, [*Morton Salt*'s] suggestion that injury to competitors is the focal point of the competitive-effects requirement has been rejected by both the commission and the courts." E. Kintner, *A Robinson-Patman Primer* 177 (2d ed. 1979); see also F. Rowe, *Price Discrimination* 127-32 (1962).

*Henry v. Chloride*, 809 F.2d 1334, 1340 (8th Cir. 1987).

[30] Even if injury to a single competitor could establish competitive injury, there was no such injury established in this case. As set forth in the section concerning antitrust injury, *infra*, there was no proof of antitrust injury or that the alleged lost sales were caused by a difference in Serv prices. Moreover, giving Feeser every benefit of the doubt, there was a total of six net losses. Six losses can only be considered to be *de minimis* losses and *de minimis* violations are not actionable. (App. A, 33a.)

tection of competition. The Robinson-Patman Act should not be transformed into a protectionist haven from competitive pricing for disgruntled competitors. The inevitable consequence will be increased litigation as competition is moved from the marketplace to the district courts. Faced with inconsistent and ambiguous law on competitive injury, district courts will have little guidance on the standards to apply to these cases and little incentive to control their dockets by use of summary judgment. Certiorari should be granted so that this Court may provide consistency and continuity to enforcement of the Robinson-Patman Act.

2. In addition to replacing injury to competition with injury to a competitor as a standard for liability under Robinson-Patman, the decision in this case goes further and transforms § 2(a) of Robinson-Patman into a *per se* statute. It does so by adopting a new rule that a showing of the slightest difference in price entitles a plaintiff to a conclusive presumption of competitive injury. As applied in this case, the Third Circuit's rule removes any need to show a connection between the difference in price and some effect on competition. It *requires* a court to ignore hard, cold and uncontradicted evidence of competitive health and a robust market as well as a plaintiff's success in selling not only the disputed products, but other products as well.

The court below purported to base its approach on this Court's decision in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). *Morton Salt* was an enforcement action brought by the FTC to compel Morton Salt to cease and desist from price discrimination (in the form of quantity discounts) that singled out the big five retailers for favoritism over a number of smaller groceries. *Id.* at 40-43. A single homogenous product was at issue, salt. The Court recognized that, in enacting Robinson-Patman, Congress wanted to reach discriminations " 'in their incipiency before the harm to competition is effected' " (*id.* at 46 n.14) and "was especially concerned with protecting small businesses which were unable to buy in quantities." *Id.* at 49. Further, the

price difference was substantial, prolonged, systematic and affected low profit margins. Given all this, the Court held that there was a reasonable probability that the discrimination would injure competition. *Id.* at 46-50. Subsequently, courts have interpreted *Morton Salt* to permit, under certain circumstances, an inference that competitive injury might arise from a substantial price discrimination over time. *See, e.g., Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1139 (D.C. Cir. 1988). The Third Circuit has now extended the reach of *Morton Salt* to cases in which it never was intended to apply. In the process, it has transformed the very purposes of the Robinson-Patman Act.

First, the Court of Appeals applied *Morton Salt* in the absence of any sustained discrimination over time. There was only a slight difference in price which was not consistent. (App. A, 41a.) Serv pricing was haphazard, at times even favoring Feeser (as it consistently received better prices on a variety of products and on others periodically). In fact, for those products where a difference in price existed, any difference to Feeser was equal to or less than the allegedly favored customer in three out of four years. (App. A, 42a.) There was also evidence that Weis (the allegedly favored customer) did not pass on rebates, allowances and other discounts from Serv (*see* Bowers Declaration at ¶ 7 (A.III-1222)); Feeser's sales were unimpaired and Feeser gained business from the "favored" customer.[31]

As a result, in this case there can be no reasonable probability that competition was affected. To apply *Morton Salt* in a private action for damages in light of these circumstances, particularly in the absence of a prolonged pattern of discrimination, conflicts with the decisions of

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[31] There was no evidence that Serv's pricing influenced resale prices. There was only "evidence" that Feeser's prices were higher than others. *See* notes 36-37, *infra*. Given that discounts were not passed on (Bowers Declaration at ¶ 7 (A.III-1222)), and the uncontradicted evidence that Feeser was able to take business (including Serv business) away from "favored" customers (*see* discussion at page 4, *supra*), Feeser's evidence is hardly probative of any effect by Serv on resale prices.

the Fifth and other circuits. *See Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir.) (on remand) (testimony of plaintiff's president that his salesmen told him of lost sales coupled with a conclusory expert affidavit showed no injury to competition; "plaintiff's reliance on *FTC v. Morton Salt* . . . and its progeny [was] not relevant"), *cert. denied*, 459 U.S. 908 (1982); *accord Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420-21 (8th Cir. 1986) (inference not applicable where there was no evidence of substantial price discrimination over time); *Black Gold, Ltd. v. Rockwool Industries Inc.*, 729 F.2d 676, 681 (10th Cir.) (inference of injury not applied as there was no showing of an impact on the ability to compete), *amended*, 732 F.2d 779 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984). *Foremost Pro Color*, 703 F.2d at 547 ("It is undisputed that section 2(a) . . . does not make price discrimination *per se* unlawful.").

Second, the Court of Appeals in this case extended *Morton Salt* by blindly applying its inference in the face of market realities. *Morton Salt* does not require a court to turn its back on demonstrated competitive facts. Certainly *Morton Salt* does not authorize a "bizarre rule of law that exalts theory 'no matter what' " over fact. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1146 (D.C. Cir. 1988). *See also FTC v. Sun Oil Co.*, 371 U.S. 505, 527 (1973) ("[I]nvocation of mechanical word formulas cannot be made to substitute for adequate probative analysis.").

The Third Circuit's extension of *Morton Salt* also conflicts squarely with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988).[32]

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[32] In the proceedings before the Federal Trade Commission, Boise Cascade presented evidence that competition in the office products industry was thriving despite any alleged price discrimination. The FTC rejected this evidence as irrelevant. The D.C. Circuit ruled that Boise's evidence of overall competitive health in the industry could rebut the inference of competitive injury, and remanded to the FTC with direc-

In *Boise Cascade*, the D.C. Circuit held that evidence of overall competitive health is inconsistent with an inference of competitive injury under the Robinson-Patman Act. *Boise Cascade* involved facts strikingly similar to those in the instant case. In *Boise Cascade*, there was intense and flourishing competition (*id.* at 1135), new entrants in the market, virtually no lost sales (only 162) and the acquisition of accounts by the allegedly disfavored customers from the favored customers. *Id.* The D.C. Circuit held that under such circumstances there is demonstrable evidence of no competitive injury and *Morton Salt* is not applicable. *Id.* at 1144.

While an inference of competitive injury may be appropriate in a case such as *Morton Salt* to stop substantial ongoing discrimination (the competitive effects of which could not be fully measured), that inference is wholly unwarranted where, as here, the alleged discrimination ended years ago, Feeser's action is merely one for damages, and the facts uncontestably demonstrate that no harm to competition occurred. As explained in *Boise Cascade*, "a price difference with the potential for causing injury will eventually result in measurable effects. . . . The more time that passes without such effects showing up, the more likely it becomes that the price difference does not in fact pose a threat of competitive injury." *Boise Cascade*, 837 F.2d at 1146 n.17. *Cf. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 591-92 (1986).

3. Finally, even if the *Morton Salt* inference could be applied to this case, the Third Circuit has transformed

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tions to consider Boise's evidence. *See Boise Cascade*, 837 F.2d at 1148.

On remand, however, the FTC, after a cursory review of Boise's evidence, summarily determined that the evidence of competitive health was "of insufficient probative force." *Boise Cascade Corp.*, 5 Trade Reg. Rep. (CCH) (1990-2 Trade Cas.), ¶ 22,902 at 22,578 (FTC Nov. 1, 1990). Even the concurring opinion on remand objected to this approach: "The Court of Appeals required us [the FTC] on remand to examine the evidence, not to explain again why we believe that under the case law the evidence proffered by Boise does not matter." *Id.* at 22,600 (Com. Ascuenaga, concurring). The see-saw history of the *Boise Cascade* case illustrates the confused state of the law in this area.

that *inference* into a *conclusive presumption*. By completely ignoring the uncontradicted evidence of a robust and energetic competitive environment, not only in the market generally but in the sales of Serv products specifically, the Third Circuit again placed itself in conflict with this Court and other courts.

There can be no doubt that the *Morton Salt* inference is rebuttable. In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 425, 435 (1983), this Court held that the *Morton Salt* inference "may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." The D.C. Circuit in *Boise Cascade* held that the *Morton Salt* inference may be overcome by evidence "showing an absence of competitive injury." 837 F.2d at 1144. In *Boise Cascade*, the court explained that by ignoring the reality of a competitive market:

> The Commission, in effect, employed the *Morton Salt* inference to presume competitive injury conclusively. . . . This approach defies both logic and the import of *Morton Salt* that the inference of injury is rebuttable; for if the respondent's evidence demonstrates that there is no competitive injury (or reasonable possibility of competitive injury) to begin with, then evidence breaking the causal connection is obviously impossible to adduce. There is, under those circumstances, no causal connection to break.

*Id.*

The court below has done exactly what the D.C. Circuit held that the FTC could not do. Moreover, the effect of the decision of the court below is to preclude summary judgment in Robinson-Patman cases. A conclusive *Morton Salt* presumption completely relieves the plaintiff of its burden in opposing summary judgment to present affirmative evidence of competitive injury, an essential element of a Robinson-Patman claim. Thus, a plaintiff effectively can avoid summary judgment even though it puts forth no evidence of competitive injury and, like Feeser, does

not even attempt to rebut uncontradicted evidence of a competitive marketplace. No decision supports such an illogical result and, indeed, it is contrary to this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

### B. Certiorari Should Be Granted To Resolve The Conflict Between The Third Circuit's Rule For Antitrust Damages And That Established By This Court And Other Circuits.

1. The Court of Appeals' interpretation of the standard for damage awards in Robinson-Patman Act cases cannot be reconciled with prior rulings of this Court or the decisions of other courts of appeals. As conceived by the Third Circuit, damages may be awarded in a Robinson-Patman Act case without a demonstration of any causal link between a defendant's actions and a plaintiff's alleged injury. Such a rule would allow damages for losses that are of no concern to the antitrust laws. It also conflicts with this Court's standards for damage awards, set forth in *Brunswick*,[33] *Perkins*,[34] and *Truett Payne*,[35] which require proof of causation and antitrust injury.

This Court has ruled that there are no automatic damages in Robinson-Patman Act cases. Among other elements, a plaintiff seeking treble damages for a violation of § 2(a) must establish under § 4 not only an actionable price difference, *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981), but also that a causal connection exists between such a price difference and the alleged injury, *Perkins*, 395 U.S. at 648; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Thus, proof of a § 2(a) violation (which must include proof of

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[33] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

[34] *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969).

[35] *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981).

competitive injury) will not alone establish that a particular plaintiff is entitled to damages under § 4. Although in some cases a § 2(a) violation may be established only by showing that competitive injury *may* result, § 4 requires more. *See Truett Payne*, 451 U.S. at 561-62 ("[P]roof of a violation [of § 2(a)] does not mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4.").

In this case, the Court of Appeals ignored the separate standard of § 4. It found that a simple price differential and isolated lost sales by a single competitor, upon which it predicated a finding of competitive injury under § 2(a), was also sufficient to establish actual injury under § 4. In so doing, the Third Circuit allowed evidence of lost sales to constitute evidence of sales lost due to the conduct of defendants.[36] Thus, while Feeser offered affidavits from six customers stating that they purchased items from Weis

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[36] The court below equated simple evidence of lost sales resulting from price differences with causation evidence. However, causation evidence is evidence that bridges a difference in price at the wholesale level (*i.e.*, a Serv-Feeser transaction) to a difference in price at the retail level (*i.e.*, a Feeser-customer transaction). Causation evidence covers not just one, but potentially numerous links in the chain of product distribution. Its effect is to negate the existence of alternative variables, such as overhead costs, inefficiency, loss-leading, etc., that might make Feeser's prices to its customers either higher or lower than its purchase price from Serv. *See Perkins*, 395 U.S. at 649 (identifying evidence that the discriminatory price was "passed down" from the wholesale level to the retail level).

A § 4 plaintiff may submit evidence to the court, as Feeser did in this case, that its own higher prices *caused* it to lose some sales to a competitor. This, however, is not the type of causation evidence (or "pass on" evidence) necessary to prevail under § 4. *See Truett Payne* 451 U.S. at 564. Rather, it is evidence of a mere difference in price between Feeser and Weis at the retail level. What § 4 requires is that plaintiff put forth evidence that the Feeser-Weis sales-price difference at the retail stage is a *direct* result of the Feeser-Weis purchase-price difference at the wholesale stage. *Id.*; *Perkins*, 395 U.S. at 649.

Thus, when the Third Circuit describes simple evidence of lost sales as direct evidence of causation, it demonstrates that it has equated mere evidence of lost sales with true causation evidence.

because Feeser's prices on those items were higher, *Feeser introduced no evidence showing that the reason for its higher prices, or for Weis' lower prices, was a difference in Serv's prices on those very same items.*[37]

In short, there was no evidence of causation in the record below. As the district court expressly noted, there was no evidentiary link between lost sales (even if they did occur) and the differences in price (even if they dis-

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[37] Feeser offered evidence that it lost a number of sales. Feeser also suggested that the reason that it lost these sales was that its competitors' prices were lower. "Typically, while the salesman will testify to lost sales, the stated reason for the loss will be that the customer's agent told him that Weis' prices were better." App. D, 61a. For example, "William Kotsalos, the buyer for Bill's Restaurant and Skyline Restaurant, stated that he purchased Serv products from Sky in the mid-1980's rather than Feeser 'because Feeser's prices for Serv portion control products were much higher.' " App. D, 65a.

But what Feeser did not introduce is true evidence of "pass on"—credible evidence that the reason its prices were higher on specific items was because of unfavorable prices from Serv on those same items and not a sense of complacency due to its enormous, unmatched growth during the period of alleged injury, a desire to gouge its customers, mismanagement, inefficiency or some other equally plausible reason. In fact, the evidence was that the allegedly favored customer did not pass on discounts and deductions. Bowers Declaration at ¶ 7 (A.III-1222).

The Court of Appeals simply vaulted over the causation element necessary to analysis under § 4. The court apparently assumed that alleged price differences together with higher resale prices by Feeser to certain customers satisfied what it considered § 4's "less stringent proof requirements." (App. A, 32a-33a.) (concluding without citation that price differences "resulted" in lost sales and profits). As the district court noted, however, the record contained no evidence from which to draw that conclusion. (App. D, 66a.) By making that logical leap, without record authority, the Court of Appeals reduced § 4's standards to those sometimes appropriate under § 2(a).

Moreover, Feeser's expert report, rejected as non-probative by the district court, was merely conclusory. "Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient." *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982); *Truett Payne*, 451 U.S. at 569-70 (Powell, J., concurring in part and dissenting in part).

favored Feeser). *See, e.g.*, App. D, 66a (finding that the customer affidavits offered by Feeser were not probative of "injury to the plaintiffs"). By not requiring *any* proof of the necessary causal link between the alleged violation of § 2(a) and the alleged damage to Feeser, the Third Circuit did nothing more than resuscitate the automatic damages standard rejected by this Court in *Truett Payne*, 451 U.S. at 561-64.[38]

Moreover, the essential causal link between a price difference and alleged damage cannot be assumed in this case. As summarized above, the uncontradicted facts show that Feeser actually prospered in every calculable way during the alleged discrimination period. As recognized by the district court, in a competitive environment it can be expected that customers will shift between competitors and that there will be price competition. This is best illustrated by Feeser's success in taking accounts and Serv business away from Weis during the period Feeser claims to have been the victim of discrimination. Customer shifting cannot—and should not—simply be assumed to be causally

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[38] The automatic-damages theory—the theory that a jury may infer the fact and amount of injury under § 4 from a mere showing of a substantial price discrimination under § 2(a)—was soundly rejected by this Court in *Truett Payne*. The lower courts that had approved of this theory prior to *Truett Payne* did so on the reasoning that because "competitive injury" could be inferred from evidence of price discrimination in § 2(a) injunctive actions, "actual injury under section 4" also could be inferred from such evidence. *See, e.g., Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). This Court rejected this reasoning on the basis of the contrasting natures of § 2(a) and § 4. *Truett Payne*, 451 U.S. at 562 (explaining that whereas § 2(a) is a prophylactic statute, § 4 is essentially a remedial statute).

By equating the standard of proof for § 4 causation with the relaxed standards of proof for § 2(a) and § 4 damages, the Third Circuit revisited the days when the measure of proof for a § 2(a) violation was identical to that for a § 4 violation. Under the Third Circuit's approach, a plaintiff's conclusory statements composed mostly of hearsay and an economist's unsupported testimony are sufficient proof of "competitive injury" and "actual injury" and may serve as the basis for treble damages.

connected to temporary and insubstantial price differentials, particularly when prices often favored Feeser.

The Court of Appeals also appears to have confused the standard of proof applicable to the element of causation with the more lenient standard that governs proof of the *amount* of damage. Thus, the court below stated:

> While the Supreme Court has lessened the stringency of proof requirements under § 4 because of the difficulties of showing exactly what position the plaintiff would have been in absent the defendant's violations of the antitrust laws . . . *at least some attempt to link the discrimination to harm to the plaintiff must be made.*

App. A, 32a (emphasis added). While proof of causation may not be subject to an "unduly rigorous" standard, *see Truett Payne*, 451 U.S. at 565, the standard has not been reduced to the minimal requirements for proving the amount of damages. Antitrust injury requires proof of a causal connection between a defendant's conduct and the alleged harm and must be proven with a fair degree of certainty. "Only when the plaintiff has demonstrated the fact of injury may the court be lenient in the amount of evidence required to prove damages." *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir. 1982), *cert. denied*, 459 U.S. 908 (1982); *see also Texaco, Inc. v. Hasbrouck*, 110 S. Ct. 2535, 2551 (1990); *Truett Payne*, 451 U.S. at 567 n.5; *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 562 (1931).

Appellate courts that have considered the issue of what is sufficient to establish antitrust injury under § 4 uniformly follow the formula now rejected by the Third Circuit that, in contrast to § 2(a)'s "relaxed" standard of proof (applicable in incipiency cases), § 4 requires a more rigorous showing of causation.[39] Those courts have consist-

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[39] *See Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1042 (9th Cir. 1987), *aff'd*, 110 S. Ct. 2535 (1990); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 670 n.14 (D.C. Cir. 1977). *Cf. World of Sleep, Inc. v. La-Z-*

ently held that a distinction exists between the quantum of proof required to establish the fact of damage and that required to prove the amount of damage.[40] They also are consistently arrayed against the Third Circuit in agreeing that a plaintiff seeking damages under § 4 is not excused from proving causation. A plaintiff may benefit from the lenient standard of proof applied to the amount of damages *only* after a causal link between the actions of the defendant and plaintiff's own injury has been established.[41]

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*Boy Chair Co.*, 756 F.2d 1467, 1479-80 (10th Cir.) (comparing the standard of proof under § 2(e), 15 U.S.C. § 13(e), to that of § 4), *cert. denied*, 474 U.S. 823 (1985).

[40] *See, e.g., U.S. Football League v. National Football League*, 842 F.2d 1335, 1378 (2d Cir. 1988); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1043-44 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Los Angeles Mem. Coliseum Comm. v. National Football League*, 791 F.2d 1356, 1360 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1478 (10th Cir.), *cert. denied*, 474 U.S. 823 (1985); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 999 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1161 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Rosebrough Monument Co. v. Memorial Park Cemetery Assn.*, 666 F.2d 1130, 1146 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert denied*, 454 U.S. 897 (1981); *Terrell v. Household Goods Carriers Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 379 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966).

[41] *See, e.g., U.S. Football League v. National Football League*, 842 F.2d 1335, 1378 (2d Cir. 1988); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1044 (9th Cir. 1987), *aff'd*, 110 S. Ct. 2535 (1990); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1044 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435 (5th Cir. 1985); *Graphic Products Distributors, Inc. v. Itec Corp.*, 717 F.2d 1560, 1579 (11th Cir. 1983); *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 836 (9th Cir. 1982); *Rosebrough Monument Co. v. Memorial Park Cemetery Assn.*, 666 F.2d 1130, 1146 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Terrell v. Household Goods Carriers Bureau*, 494 F.2d 16, 20 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974); *Washington State*

That the Court of Appeals misformulated the actual injury standard may be the result of confusion that surrounds the interrelationship of incipiency statutes, such as § 2(a) of the Robinson-Patman Act and § 7 of the Clayton Act, and remedial/punitive statues such as § 4. In *Brunswick*, this Court acknowledged that, "[i]ntermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty." 429 U.S. at 486; *see also Truett Payne*, 451 U.S. at 567; *id.* at 570 (Powell, J., concurring in part and dissenting in part) (referring to "the uncertainty inherent in the generalities of the Robinson-Patman Act"). Indeed, in its most recent pronouncement in a § 4 damage action for violation of § 2(a), this Court cautioned against blurring the distinction between liability and damage issues. *See Texaco, Inc. v. Hasbrouck*, 110 S. Ct. 2535, 2551 (1990). Robinson-Patman Act enforcement requires a clear statement from this Court to avoid continued confusion and needless litigation.

2. This Court has ruled that on a motion for summary judgment the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-56 (1986). The substantive burden applicable to § 4 causation and antitrust injury is "substantial" evidence. *Perkins*, 395 U.S. at 649; *Truett Payne*, 451 U.S. at 563-68.[42] As set forth above,

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*Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 379 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966); *Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

[42] The courts of appeals variously have described the required measure of proof as the **"substantial evidence,"** *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 782-83 (11th Cir. 1983); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 581-82 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982); *Interstate Cigar Co. v. Sterling Drug, Inc.*, 655 F.2d 29, 31 (2d Cir. 1981), **"preponderance of evidence,"** *Los Angeles Memorial Coliseum Comm. v. National Football League*, 791 F.2d 1356, 1365 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987); *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 711 (2d Cir. 1983); *Multiflex, Inc. v. Samuel Moore & Co.*,

plaintiff must demonstrate antitrust injury " 'as a matter of fact and with a fair degree of certainty.' " *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d at 581. "Conclusory statements by the plaintiff, without evidentiary support, as to the fact of damage caused by the alleged antitrust violation are not sufficient." *Id.*[43]

By denying summary judgment in the absence of any evidence, much less "substantial evidence" of causation, the court below deviated from these requirements, adopted a new requirement for § 4, and created a single "less than stringent proof requirement," *see* App. A, 32a, for both the fact and amount of damage. The court below thereby permitted a plaintiff to escape summary judgment without presenting any evidence of causation, an essential element in its burden of proof.

3. Causation cannot be inferred in this case. This Court has ruled that applicable substantive law in an antitrust case will dictate which inferences may or may not be drawn from ambiguous summary judgment evidence. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). Because the substantive law underlying § 2(a) and § 4 cases is different, *see Truett Payne*, 451 U.S. at 561-62, the permissible inferences in a § 2(a) case differ from those in a § 4 case. In appropriate § 2(a) cases,[44]

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709 F.2d 980, 993 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *In re Plywood Antitrust Litigation*, 655 F.2d 627, 635 (5th Cir. 1981), *cert. dismissed sub nom. Weyerhaeuser Co. v. Lyman Lamb Co.*, 462 U.S. 1125 (1983), or **"fair degree of certainty"** standard of proof, *McClure v. Undersea Industries, Inc.*, 671 F.2d 1287, 1289 (11th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897 (1981); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 387 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974).

[43] "Moreover, '[w]hen the fact of injury is in issue, the "isolated self-serving statements" of a plaintiff's corporate officers may not provide substantial evidence upon which a jury can rely.' " *Argus, Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 42 (2d Cir. 1986) (citations omitted), *cert. denied*, 479 U.S. 1088 (1987).

[44] *See* Section A, *supra*.

*Morton Salt* allows courts to infer from certain evidence that defendant's conduct may cause "competitive injury." However, *Morton Salt* has no applicability to § 4. A treble damages plaintiff cannot avoid summary judgment on the issue of causation of "actual injury" by putting forward the same *de minimis* lost sales it put forward to support competitive injury under § 2(a). *Truett Payne*, 451 U.S. at 561. Rather, under § 4, a plaintiff must present evidence that shows favorable inferences to be reasonable in light of competing unfavorable inferences. *Matsushita*, 475 U.S. at 588. Failure by the plaintiff to do so should have required dismissal of the case.

Despite § 4's different substantive evidentiary requirements and the standards clearly established by this Court, the Third Circuit inferred the existence of § 4 causation based on the same fragmentary evidence that Feeser offered to show competitive injury under § 2(a). Even if the evidence advanced by the defendants of a vigorous, healthy and competitive environment and a successful, strong plaintiff was not sufficient to establish conclusively the absence of causation and antitrust injury, plaintiff's affirmative evidence was plainly no better than ambiguous. Because plaintiff did not offer additional unambiguous evidence that would support an inference of causation, summary judgment was required.

In *Matsushita*, this Court recognized that to permit inferences of conspiracy from ambiguous evidence in a Sherman Act § 1 case will often deter procompetitive conduct. *Matsushita*, 475 U.S. at 593-95. By the same standard and analysis, inferences of injury based on ambiguous evidence in a Robinson-Patman Act case may also deter procompetitive price competition.

Thus, the Third Circuit approach, if allowed to prevail, would create new standards for § 4 and for summary judgment. These standards conflict with those established by this Court and followed by the other circuits; they would make summary judgment in Robinson-Patman cases virtually impossible.

## CONCLUSION

Because the decision below deviates materially from the standards articulated by this Court and by the other courts of appeals for the maintenance of actions for damages under § 2(a) of the Robinson-Patman Act and § 4 of the Clayton Act, and because that decision adds immeasurably to the judicial confusion and inconsistency that now prevails in private actions for damages under these statutes, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

January 17, 1991

Respectfully submitted,

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# APPENDICES

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## APPENDIX A

Filed August 2, 1990

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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**No. 89-5729**

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J.F. FEESER, INC., AND JUNIATA FOODS, INC.,
*Appellants*

vs.

SERV-A-PORTION, INC.; HUNT-WESSON FOODS, INC.; and WEIS MARKETS, INC.; MARK CRANE, MEDIATOR, SKY BROTHERS, Movant

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**Appeal from the United States District Court**
**for the Middle District of Pennsylvania**
**(D.C. Civil No. 85-00684)**

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**Argued**
**February 1, 1990**
**Before: STAPLETON and MANSMANN,**
***Circuit Judges*, and**
**ACKERMAN, *District Judge*.***
**(Filed August 2, 1990)**

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* Honorable Harold A. Ackerman of the United States District Court for the District of New Jersey, sitting by designation.

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## OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

In this antitrust matter involving the highly competitive food distribution business, we are asked to review a grant of summary judgment in favor of the defendants, a supplier and a wholesaler, and against the plaintiff wholesalers. The litigation primarily involves allegations of secondary line price discrimination in violation of sections 2(a) and 4 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), 15 (1936). Secondary line injury cases are characterized by price discrimination by a seller in sales to competing buyers.

Also at issue are whether the plaintiffs presented sufficient and relevant material facts to defeat the entry of summary judgment on a Sherman Act claim, i.e., did a conspiracy exist between the supplier and a competing wholesaler to discriminate in price to the detriment of the plaintiff-wholesalers, and whether one of the plaintiffs had the standing to bring this lawsuit. The plaintiffs allege that the district court usurped the function of the jury by improperly resolving disputed questions of fact and by evaluating the credibility of the testimony.

On review de novo, we conclude first, with respect to the Robinson-Patman Act claim, that the plaintiff has presented sufficient evidence supporting its position that, over a four year period of time, the defendant supplier discriminated against it in the prices charged for portion-controlled products. Genuine issues of material fact exist concerning whether the discrimination caused competitive injury (i.e., a reasonable possibility of harm to competition) which resulted in actual damage to the plaintiff. We will, therefore, vacate the district court's grant of summary judgment on this claim and remand for trial.

As to the Sherman Act claim, the present record does not reflect sufficient evidence of either the conspiracy or arrangement to exclude the plaintiff from the food distribution market to sustain a Sherman Act violation. We are aware, however, that the district court limited discovery to the issues of competitive impact and injury in the context of the Robinson-Patman claim. Since the plaintiffs alleged, in an affidavit filed pursuant to Fed. R. Civ. P. 56(f), that further discovery will uncover evidence of the conspiracy, we will vacate the dismissal of this count and remand for further discovery.

Finally, we find that the district court erred in deciding that Plaintiff Juniata Foods, Inc., does not have standing to proceed in the action. In conflict with other evidence, an affidavit indicates that Juniata was a wholesaler who directly purchased from Serv-A-Portion. Once again, questions of material fact remain for the factfinder. Juniata, at this stage, will remain in the lawsuit.

I.

The plaintiffs, J.F. Feeser, Inc., now known as Feesers, Inc., and Juniata Foods, Inc., commonly-owned corporations, are wholesale distributors of food products and related items to institutional purchasers (e.g., schools, nursing homes, hospitals, caterers and restaurants). Defendant Weis Markets, Inc., is engaged in the business of distributing food and related products to the same type of institutional customers to whom Feeser and Juniata distribute and is, therefore, in direct competition with them. Defendant Serv-A-Portion, Inc., is a manufacturer and packager of food products which it sells to distributors. Serv-A-Portion is a leading supplier of portion-controlled food products, such as individual servings of ketchup, jelly, syrup and dressings. Serv-A-Portion has sold, and its successor, DiGiorgio Foods,[1] has continued to sell, a variety

[1] Serv-A-Portion argues mootness by contending that the lawsuit is

of portion-controlled products to Feeser, Weis Markets and other competitors, including Tartan Foods and Sky Brothers in interstate commerce. The claims against Hunt-Wesson Foods. Inc., also a manufacturer and package of the portion-controlled products, have been settled.

It is undisputed that food distribution is a highly competitive business. Since portion-controlled products are primarily "give away" items,[2] the end user (i.e., the final institutional purchaser) is sensitive to minute price differences between the competing wholesalers. In addition, these particular products are considered "bellwether" items which are customarily utilized as a gauge by the distributor's customers to evaluate a company's overall pricing. Accordingly, it is contended by Feeser and Juniata that its inability to offer competitive prices on Serv-A-Portion products not only impacted on its overall business goodwill but also caused the loss of other business.

The impact of these price differences prompted Feeser and Juniata[3] in 1985 to file a complaint contending that Serv-A-Portion discriminated against them in the prices it charged for its portion-controlled products and in favor of its competitors, Weis Markets, Tartan Foods and Sky

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automatically terminated by the sale of DiGiorgio's Serv-a-Portion division on May 31, 1988. Feeser counters that the action continues under the authority of Fed. R. Civ. P. 25(c) which states:

> In the case of a transfer of interest, the action may be continued against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Although neither party has filed the appropriate motion, Feeser has made known its intention to present a Rule 25(c) motion to enforce its rights against Serv-A-Portion's successor. This appeal appropriately continues against Serv-A-Portion.

[2] Give-away items are provided to consumers, such as diners in restaurants, at no cost. These products thus do not yield a direct return to the institution providing the items. App. at 2759.

[3] We refer to the plaintiffs collectively as "Feeser."

Brothers. The alleged discrimination primarily involved the manner in which Serv-A-Portion conducted its pricing policies. According to Feeser, Serv-A-Portion had two general categories of pricing: truckload and bidding. It is Serv-A-Portion's bid pricing which Feeser contends operated in a discriminatory fashion. Products purchased through Serv-A-Portion's bidding process, available at lower prices, were offered to Serv-A-Portion's customers (the wholesalers) only on a case-by-case basis after submission of a formal and specific bid and on condition that they could be resold only to certain end users. It is not contested by Serv-A-Portion that its bidding requirements were not rigidly followed nor that Weis Markets used Serv-A-Portion's failure to enforce its procedures to Weis Markets' advantage by selling products purchased by bid to *any* of its customers.

It is also contended by Feeser that Serv-A-Portion utilized other pricing mechanisms to camouflage price discrimination, such as affording special allowances and permitting deductions. Feeser claims that although Tartan Foods and Sky Brothers derived benefits from Serv-A-Portion's deviation from established business practices, it was not granted similar advantages. As a direct result, Feeser alleges that it lost sales when its customers took advantage of the more favorable prices of Serv-A-Portion products offered by Feeser's competitors, Weis Markets, Tartan Foods and Sky Brothers. Feeser claims also that its revenues declined when it was forced to reduce its margins to attempt to meet the prices offered by the favored competitors. In addition to losing sales and incurring reduced profits, Feeser's inability to match Weis Markets' prices resulted in a loss of goodwill among its customers, so that Feeser was not asked to service them on other products.

Feeser requested injunctive relief and treble damages for violations of sections 2(a) and 2(f) of the Robinson-Patman Act and section 1 of the Sherman Act. Feeser also averred that the activity engaged in by the defendants

represented unfair competition which violates the common law of Pennsylvania.

In September of 1985, four months after the complaint was filed, Serv-A-Portion asked the district court to require Feeser to identify and document as a threshold matter all the details of Serv-A-Portion's price discrimination and to cut off all discovery requested by Feeser relating to Serv-A-Portion's sales to competitors other than Weis Markets. On April 29, 1986, the district court entered a discovery order permitting Feeser to review only certain records maintained by Hunt and Serv-A-Portion for a one-year period to be selected by Feeser; requiring that Feeser's expert provide all parties with a price comparison report, supported by documentation, of transactions between Hunt, Serv-A-Portion and Weis Markets; and mandating that Feeser's expert provide all parties with a pricing report comparing transactions between Hunt and Serv-A-Portion and their customers.

Discovery continued in this prescribed manner. Feeser's expert economist, Dr. Robert Larner, prepared a pricing analysis that, *inter alia*, compared Serv-A-Portion's sales of identical products: (a) to Feeser and Weis Markets for the period January 1982 through January 1986; and (b) to Feeser, Tartan Foods and Sky Brothers for the period January 1984 through December 1984 - the year for which discovery of Serv-A-Portion's sales to those competitors was permitted.

Upon presentation of this evidence by Feeser, Serv-A-Portion contended that the report prepared by Dr. Larner did not show competitive injury and requested that discovery be focused upon the elements of competitive and actual injury. The district court then limited the next phase of discovery to competition and injury and enumerated the manner and extent of such discovery.

On June 9, 1988, Serv-A-Portion filed a motion for summary judgment directed toward the issues of competitive

impact and injury. For purposes of its motion, Serv-A-Portion acknowledged a slight difference between the prices charged by Serv-A-Portion to Weis Markets and Feeser. Nonetheless, referencing primarily the overall competitive health of the institutional food industry, Serv-A-Portion contended that Feeser had not suffered any injury from any of Serv-A-Portion's pricing practices.

At the outset, the district court rejected Serv-A-Portion's position, which relied upon *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988), that, because of the overall competitive health of Feeser and of institutional food distributors generally, there can be no competitive injury for Robinson-Patman purposes. The court disregarded this view finding *Boise Cascade* to be contrary to Supreme Court authority, *see Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) (a competitor's sales growth does not rule out a Robinson-Patman claim), and distinguishing it factually on several important grounds.

The district court then sought to determine whether Feeser could prove a Robinson-Patman violation under the doctrine of *Falls City Industries Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), by showing lost sales or profits caused by the price differential. According to the district court, establishing lost sales caused by Serv-A-Portion's pricing policies was essential in order to demonstrate actual injury entitling Feeser to treble damages under section 4 of the Clayton Act.[4]

In reviewing the record submitted in response to the summary judgment motion, the district court systemati-

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[4] Section 4 of the Clayton Act, 15 U.S.C. § 15 (*as amended* 1980) (Supp. 1990) reads:

> Except as provided in subsection (b) of this section, any person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained. . . .

15 U.S.C. § 15(a).

cally excluded much of Feeser's evidence presented through depositions and affidavits. First, the district court denied consideration of depositions of a number of Feeser's salesmen, finding them to constitute hearsay. Other salesmen's depositions, the court decided, were "simply too vague, conclusory or incomplete for a reasonable jury to place reliance upon them." *J. F. Feeser, Inc. v. Serv-A-Portion, Inc.*, No. 85-0684, slip op. at 10 (E.D. Pa. Aug. 4, 1989). The court found some of the depositions probative of lost sales as indicative of better prices offered to favored competitors, yet dismissed the relative worth of these depositions on the assumption that some price differentials would normally occur given the particular nature of the food distribution industry. The district court concluded that there must be more than de minimis violations, as it characterized Feeser's evidence, of the Robinson-Patman Act in both volume and price before competitive injury could be found.

The district court then examined employee affidavits submitted by Feeser. The court rejected the affidavits of Feeser salesmen Fuller and Andrews and Juniata's Miller, believing that the hearsay statements of certain customers who refused to buy from them contravened the provision of Fed. R. Civ. P. 56(e), that affidavits must be based on personal knowledge and on facts which would be admissible at trial.

Feeser had also submitted affidavits from some of the customers themselves. In general, these affidavits indicated that these customers did not buy from Feeser, but rather purchased from Weis Markets, Tartan Foods and Sky Brothers who offered better prices. The district court did find these affidavits admissible, but once again pointed to the de minimis nature of the evidence and declared that the affidavits were not probative of injury suffered from price discrimination.

The district court then turned to the evidence presented concerning other wholesalers who purchased from Serv-A-Portion.[5] The court accepted the testimony of Joanne Straw, who testified that her company, W. R. Straw, Inc., lost sales of Serv-A-Portion products to Pennsylvania State University because the prices Weis Markets offered to Penn State were lower than Straw's actual cost from Serv-A-Portion. The district court did not accept a similar affidavit from Joseph Spagnola, a buyer for R & R Provision Company, which was based upon information from Spagnola's sales personnel, finding that it constituted inadmissible hearsay. The court then characterized this evidence from competitors as "completely non-probative." *Id.* at 20.

The district court next reviewed the expert report prepared for Feeser by Dr. Robert Larner in light of the Robinson-Patman test enunciated by the Supreme Court in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). Under the *Morton Salt* test, a plaintiff can show injury to competition by providing either proof of a substantial price discrimination between competing purchasers over time or by providing direct proof of lost sales or profits.[6]

Although rejecting Serv-A-Portion's major objection to the expert report - that Dr. Larner did not address what Serv-A-Portion considered the relevant economic consideration - the overall growth of competition in the food distribution industry in general and of Feeser in particular - the district court was critical of Dr. Larner's analysis for several other reasons. First, the district court questioned Dr. Larner's use of four-year periods in his report (1978 through 1982 and 1982 through 1986). The court agreed with Serv-A-Portion that the only apparent reason

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[5] These distributors are not parties to the lawsuit.

[6] Appendix A to this opinion represents a summation of the Larner Report comparing prices paid by Feeser and Weis Markets, Tartan Foods and Sky Brothers for several Serv-A-Portion portion-controlled products.

for this grouping was that it achieved the results desired by Dr. Larner. The district court did not credit Dr. Larner's justification that yearly figures fluctuate for various reasons and by using four-year periods he could establish a greater track record and eliminate unusual events or their effects in one particular year. The district court found objectionable Dr. Larner's failure to elucidate these reasons or unusual events and concluded that "a reasonable jury would not accept his conclusory reasoning as a valid basis for using four-year periods. . . ." *Id.* at 24.

The district court then evaluated with skepticism Dr. Larner's analysis of the increasing and decreasing percentages of Feeser's purchases from Serv-A-Portion and concluded that such comparisons between Feeser's total sales and its Serv-A-Portion purchases revealed nothing about competitive injury or discriminatory pricing. With respect to the figures of the lower prices which Feeser alleged were given to favored competitors, the district court examined the numbers and determined that if Serv-A-Portion had intended to win the favor of Weis Markets, "it did not do a very good job of it." *Id.* at 29.

Finally, the district court rejected Dr. Larner's calculations for the six-month period showing differences in Weis Markets' and Feeser's profit margins on the grounds that the report utilized an insufficient number of products over an insufficient period of time.

Turning to Feeser's Sherman Act claim, the district court determined that it must sustain the same fate as the Robinson-Patman allegation because Feeser had not proven any injury to itself or to competition. The district court opined that even assuming a conspiracy between Serv-A-Portion and Weis Markets to grant Weis favorable pricing, this activity, without proof of an arrangement to exclude others from the buyer's market, was not actionable under the Sherman Act. In effect, the district court found that since the sale of Serv-A-Portion products at discrim-

inatory prices is not a Sherman Act violation, a conspiracy to do so is not actionable. The district court also pointed to the lack of evidence indicating any conspiracy or agreement between Weis and Serv-A-Portion to discriminate in price. After deciding that Juniata had no standing to participate in the lawsuit because of evidence that Juniata was not a direct purchaser from Serv-A-Portion, the district court granted Serv-A-Portion's motion for summary judgment.

The district court then turned to Feeser's claims against its competitor, Weis Markets, Inc. Although Weis Markets had not moved for summary judgment,[7] the court dismissed all of Feeser's claims against Weis on the ground that such claims depended upon the validity of Feeser's claims against Serv-A-Portion. The pendent state claims were dismissed without prejudice to refiling in the appropriate state court.

Feeser has appealed this final judgment and our jurisdiction is thus premised on 28 U.S.C. § 1291.

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[7] On appeal Weis Markets submitted a brief detailing generally its position that its decisions concerning Serv-A-Portion purchases were unilateral and not dictated by another competitor's activities. It averred that there is no evidence that it knowingly induced or received lower prices in violation of section 2(f) of the Robinson-Patman Act.

In this same vein, as to the Sherman Act allegation, Weis Markets disputes that there is any evidence of conspiracy between Serv-A-Portion and Weis which would support such a violation.

Feeser does not specifically respond to any of Weis Markets' evidentiary contentions, but counters that Weis lacks standing to argue any point on appeal since it did not raise such issues before the district court. Because our decision vacating the grant of summary judgment in favor of Serv-A-Portion necessarily involves the disposition previously rendered in regard to Weis Markets, we need not address the argument premised on Weis' lack of standing to proceed.

## II.

On appeal from the grant of summary judgment we review the evidence de novo and apply the same standards applicable in the district court.

The now familiar and oft-cited trilogy of Supreme Court cases, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Matsushita Electronic Industrial, Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) refocused the burden of both the movant and the non-movant in summary judgment actions. As a general rule, if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, then summary judgment is appropriate. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. at 247. Although the moving party has the initial burden of identifying the evidence that demonstrates the absence of a genuine issue of material fact, the respondent (the "non-movant") must establish the existence of each element on which it bears the burden of proof. *Celotex*, 477 U.S. at 323. The non-movant is entitled to all reasonable inferences in its favor. We are keenly aware that credibility determinations are not the function of the judge; instead the non-movant's evidence must be credited at this stage. *Anderson*, 477 U.S. at 249, 255.

When summary judgment is requested in the context of antitrust litigation, adherence to this standard is appropriate. *Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir. 1988), *citing, Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574 (1986).

We thus turn to the substantive legal standard applicable to each count of Feeser's complaint and review the specific evidence offered by the parties in the context of the summary judgment burdens set forth by the Supreme Court.

## III.

Section 2(a) of the Robinson-Patman Act, a 1936 amendment to the Clayton Act, provides, in pertinent part, as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them. . . .

15 U.S.C. § 13(a).

In order to establish a *prima facie* violation of section 2(a) of the Act, a plaintiff must demonstrate a reasonable possibility that a price difference may harm competition. *Falls City Industries*, 460 U.S. at 435 (1983), *citing Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945). "In keeping with the Act's prophylactic purpose, [designed to prevent the occurrence of price discrimination rather than to provide a remedy for its effects], section 2(a) does not require that the discrimination must in fact have harmed competition." *Falls City Industries*, 460 at 435, *quoting J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Instead, a reasonable possibility of harm, often referred to as competitive injury, must be shown. Demonstrating competitive injury as part of a *prima facie* case suffices to support injunctive relief and implicates further examination of a plaintiffs entitlement to treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15. To recover treble damages a plaintiff must prove more than a violation of section 2(a); it must show the extent of actual injury attributable to the harm to competition. *Hasbrouck*

*v. Texaco*, 58 U.S.L.W. 4807, 4810 (June 14, 1990), citing *J. Truett Payne*, 451 U.S. at 562.

Thus, to survive Serv-A-Portion's motion for summary judgment regarding Feeser's request for injunctive relief, Feeser must establish, by competent evidence, that there is a genuine issue of material fact as to whether Serv-A-Portion engaged in pricing policies that caused competitive injury in the market in which the parties participate. Then, to establish entitlement to section 4 treble damages, Feeser must demonstrate a causal connection between the competitive injury and specific damage suffered by it.

Since Feeser admits that the alleged discrimination terminated in 1987, the claim for injunctive relief is moot. What must be proven then is that Serv-A-Portion violated the Robinson-Patman Act and that Feeser was, as a consequence, injured in *its* business. After proof of these elements, Feeser must show the amount of damage it was caused to suffer because of the unlawful conduct. Since the limited scope of the discovery permitted by the district court did not extend to the extent of the damages suffered, we examine whether the present record justifies an expansion of inquiry into this area; *see Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (uncertainty with respect to quantum of damages does not preclude section 4 recovery).

We begin with the threshold question of whether section 2(a) has been violated. In *Hasbrouck v. Texaco*, 58 U.S.L.W. at 4810, the Supreme Court reaffirmed the principle enunciated in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), that price discrimination within the meaning of section 2(a) is merely a price difference. Here, Serv-A-Portion has conceded, for summary judgment purposes, that a slight difference in price did exist between its products which were sold to Feeser and its products which were sold to Weis.[5]

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[5] The only evidence in the record of the amount of the difference is

The existence of this price differential does not, however, end the inquiry. In *Anheuser-Busch*, the Court was careful to emphasize that since price differences constitute only one element of a section 2(a) violation, all price discriminations are not illegal per se. 363 U.S. at 553. Rather, in order for a price difference to be illegal under the statute, the difference must have the proscribed anti-competitive effect. Accordingly, we now turn our attention to the element of competitive injury.

A.

At the outset, we are compelled to address a question which, although not emphasized by the defendants or the district court, is of significance here. This issue focuses on whether the protective concern of the Robinson-Patman Act is one directed towards competition in general or whether its goal reaches to protection of specific competitors. Once the scope of the competitive injury is resolved, we then reach the second step - the degree of certainty to which a plaintiff must prove that the requisite injury has occurred in order to establish entitlement to treble damages.

Section 2(a) specifies three possible consequences of price discrimination which will satisfy its "effects" proviso, i.e., that the discrimination in price had an adverse "effect" on competition. Although in section 2(a) the first two of these effects refer specifically to discriminatory practices which lessen competition or tend towards monopoly, i.e., *broad* competitive impacts, the third makes price discrimination illegal where it adversely affects the ability of individual companies to compete. Thus, section 2(a) makes it unlawful to discriminate in price where "the effect may be . . . to injure, destroy or prevent competition with any

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Dr. Larner's report, expressed in percentages. Although it does not challenge the figures, Serv-A-Portion does contend that the dollar amounts which these percentages represent are very slight.

person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . . " 15 U.S.C. § 13(a). The language of the statute reflects concern both for the preservation of competition and for the protection of individual competitors. E. Kintner, Federal Antitrust Law, § 22.2 (1983).

The legislative history as well indicates that one of the factors leading to the 1936 amendment of the Clayton Act was the perception that the 1914 version, containing only the first two conditions, was concerned exclusively with injury to competition. U.S. Representative Hubert Utterback, the congressman in charge of the Conference Report, explained the meaning of the amendments as follows:

> Effects nos. 1 and 2 above correspond to those required to be shown under the old section 2 of the Clayton Act. Generally speaking, they require a showing of effect upon competitive conditions generally in the line of commerce and market territory concerned, *as distinguished from the effect of the discrimination upon immediate competition with the grantor or grantee.* The difference may be illustrated where a nonresident concern opens a new branch beside a local concern, and with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; but competition with the grantor of the discrimination has been destroyed. *The present bill is, therefore, less rigorous in its provisions as to the effect required to be shown in order to bring a given discrimination within its prohibitions.*

80 Cong. Rec. H9417 (1936) (statement by Rep. Utterback) (emphasis added).

The Report of the Senate Judiciary Committee explained this portion of the proposed amendments as follows:

> This clause represents a recommended addition to the bill as referred to your committee. It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is the injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.

*FTC v. Morton Salt Co.*, 334 U.S. at 49-50 n.18 *quoting*, S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

This statutory language and legislative history are highly persuasive indicia of Congress' intent to outlaw price discrimination that tends to injure competitors, rather than competition in general, which we must follow unless the Supreme Court has construed the statute in a contrary manner.

The Supreme Court has read § 2(a) in accordance with its language and legislative history. For example, the Court examined this precise issue in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). After its review of the legislative history of the Robinson-Patman Act, the Court stated that the new provision (of the Act) was intended to justify a finding of injury to *competition* by a showing of injury to a competitor victimized by the discrimination. *Id.* at 47. In so doing, the Court held that harm to competition "may be inferred from evidence that some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay.' " *Hasbrouck v. Texaco*, 58 U.S.L.W. at 4810, quoting *Morton Salt*, 334 U.S. at 46-47. In *Morton Salt*, the Supreme Court also explicitly stated that a showing that price discrimination was sufficient in

amount to influence resale prices was "in itself . . . adequate" to show competitive injury. 334 U.S. at 47. This was because "[i]t would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and sellers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers." *Id.* at 50-51.

In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), the Supreme Court held that a violation of section 2(a) of the Robinson-Patman Act is proven upon a showing that the effect of such discrimination "may be substantially to lessen competition." *Id.* at 561. The Court subsequently held in *Falls City Industries*, 460 U.S. at 434-35 that if a discriminatee shows "proof of substantial discrimination over time" or direct evidence of lost sales caused by the discrimination, then "a reasonable possibility that a price difference may harm competition exists."[9]

Subsequent decisions of the courts of appeals have advocated a wide breadth of protection afforded by the Act. In *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987), the Court of Appeals for the Second Circuit held that "[i]n order to establish the req-

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[9] Although earlier decisional history of the degree of certainty needed to demonstrate actionable Robinson-Patman injury runs the semantical gambit from "reasonable possibility," *see Corn Products Refining*, 324 U.S. at 742, to "reasonable probability," *see Foremost Diaries, Inc. v. F.T.C.*, 348 F.2d 674, 680 n. 11 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), the 1983 Supreme Court decision in *Falls City* confirms that a reasonable possibility that the price differential may harm competition is the appropriate standard. 460 U.S. at 434-35.

To assist in determining the meaning of reasonable possibility, one commentator suggests that "while certainty is not to be required, neither can plaintiff prove its case by mere hypothesis of competitive injury." *Kintner*, § 22.5.

uisite competitive injury in a secondary line case the plaintiffs must prove that, as a disfavored purchaser, it was engaged in actual competition with the favored purchaser[s] as of the time of the price differential." *Id.* at 584. Its rationale was based upon the Supreme Court's language in *FTC v. Anheuser-Busch*, 363 U.S. 536, 546 (1960), that "the existence of competition among buyers who are charged different prices by a seller is obviously important in terms of adverse effect upon secondary line competition." *Best Brands*, 842 F.2d at 584, citing 5 J.O. Von Kalinowski, Antitrust Laws in Trade Regulation, § 30.02[1] (1987) (and cases cited therein). The Court of Appeals for the Second Circuit concluded that "the competitive nexus requirement is satisfied where there is a showing of competitive contact between the recipients of the price differential." *Id.* at 585.

An expanded approach to the reach of section 2(a) liability has also been adopted in a case from the Court of Appeals for the Ninth Circuit, recently affirmed by the Supreme Court in *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1987), *aff'd* 58 U.S.L.W. 4807 (June 14, 1990), a case involving primarily the status of functional discounts in the context of the Robinson-Patman Act, the court of appeals found that the distinction between protecting competition and protecting competitors had been "misconstrued with some regularity." The court opined that the purpose of drawing a distinction between harm to competition and harm to competitors is to demonstrate that, although not all acts that harm competitors harm competition, the converse is not true. The court reasoned:

> Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct.

*Id.* at 1040. After a discussion of the type and the extent of harm required to demonstrate a Robinson-Patman violation, the court concluded that "in order for a plaintiff to prove competitive injury under Robinson-Patman, he need only show that a substantial price discrimination existed as between himself and his competitors over a period of time." *Id.* at 1041.[10]

The Court of Appeals for the First Circuit examined this issue in *Monohan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989), a case brought under the Sherman Act. Although there was no allegation of a Robinson-Patman violation because of the absence of interstate dealings, the court nonetheless discussed the Act and distinguished it from the Sherman Act by stating that the Robinson-Patman Act extends its protection to competitors while the Sherman Act protects competition, it construed the Robinson-Patman Act to protect "those who compete with a favored seller, not just the overall competitive practice." *Id.* at 529. Thus, in the opinion of our sister court, the Robinson-Patman Act will forbid selective but non-predatory price competition in some circumstances. *Id.*

Therefore, we today decide that the statute and its accompanying legislative history, the Supreme Court decision in *Morton Salt* and the recent jurisprudence of Robinson-Patman secondary-line cases compel a holding that evi-

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[10] Unfortunately the precise issue of the intended scope of the Act in regard to the targeted effect on competition was not before the Supreme Court on certiorari. The Court, however, did reference its prior reasoning in *Falls City*, 460 U.S. at 436, that "the competitive injury component of a Robinson-Patman violation is not limited to the injury to competition between the favored and disfavored purchaser; it also encompasses the injury to competition between their customers." *Hasbrouck v. Texaco*, 58 U.S.L.W. at 4814 (quoting *Falls City*, 460 U.S. at 436). Thus by inference, a showing of price discrimination between competing purchasers can suffice to satisfy the required element of injury to competition within the meaning of the Act.

dence of injury to a competitor may satisfy the component of competitive injury necessary to show a violation of the Robinson-Patman Act. We thus turn to specific evidence of this factor and ask whether the record is sufficient at the summary judgment stage to show competitive injury.

Injury to competition is usually shown in either of two ways: proof of lost sales or profits, *Falls City Industry, supra; Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987), or under the *Morton Salt* test, proof of a substantial price discrimination between competitors over time. Under this test we keep in mind the Supreme Court's instruction that a showing that price discrimination influenced resale prices is itself adequate to show competitive injury. 334 U.S. at 47.

**B.**

***Lost Sales or Profits***

It is not contested by Serv-A-Portion that there is a slight difference in prices offered to Weis, Tartan Foods and Sky Brothers than to those offered to Feeser. To demonstrate how this price differential equated to proof of lost sales or profits, Feeser first proffered excerpts from depositions of its employees.[11] Our de novo analysis of the

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[11] Although the district court disallowed a considerable part of this testimony as hearsay, it acknowledged that some of the excluded depositions would be admissible under Fed. R. Evid. 803(3) if the customer's motive for not purchasing from Feeser was relevant to this action. Finding that motive was not germane, the district court disallowed the bulk of the depositions. The district court erred in this regard because the reason why a customer was not doing business with a particular seller is relevant in a lost profits/sales inquiry and its causal connection to the pricing practices of the alleged violator. If Feeser was losing sales or was being forced to cut its selling prices and thereby reducing its profits to meet Weis' price, this is directly related to actual injury. *See* Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 914 (2d Cir. 1962) ("[s]tatements of a customer as to his reasons for not dealing with a supplier are admissible for this limited purpose,"

depositions reveals sufficient admissible evidence of lost sales and profits to meet the burden of the non-movant in a summary judgment proceeding.

Generally, the sales people testified concerning transactions with a number of their end user customers when they either lost sales of Serv-A-Portion products to Weis Markets or were forced to greatly reduce their prices of the products, because of their inability to match their competitor's prices. For instance, Paul Thuss testified that after 10 years of conducting business with a Holiday Inn, he lost Serv-A-Portion product sales to Weis Markets. The manager of the institution told Thuss that the reason he switched to Weis was that Thuss' prices were "way out of line with [Serv-A-Portion] products—I'm buying them from your competitor."

Kevin Fox discussed transactions occurring at the Arlington Diner. He testified that for a period of time he was forced to reduce his prices on Serv-A-Portion products to compete with Weis Markets and then eventually lost the sales because of his inability to match Weis Markets' prices.

Richard Miller related in his deposition that he had problems selling portion-controlled products at the Old Maine Restaurant where Juniata and Weis Markets were the main purveyors of Serv-A-Portion goods because he "got blown

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*i.e.*, the purpose of proving customer motive, but not as evidence of the facts recited as furnishing the motives); *see also* Hydrolevel Corp. v. Am. Soc. of Mech. Engineers, 635 F.2d 118, 128 (2d Cir. 1980) (following *Schwabe*); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803[03], at 803-112 (1988).

There is contrary authority. In Reserve Supply Corp. v. Owens Corning Fiberglass, 639 F. Supp. 1457 (N.D. Ill. 1986), it was held that deposition testimony relating conversations in which former customers told an official of the plaintiffs company that they had been purchasing [a product] from lower priced distributors was inadmissible hearsay. The district court cited no authority nor offered any rationale for its decision and, thus, we do not consider it persuasive.

out of there on price." Miller additionally testified that his inability to match the prices on Serv-A-Portion products resulted in the loss of his business integrity with that particular customer.

Describing his dealings with a hospital in Harrisburg concerning Serv-A-Portion products, William Monteith stated that Weis Markets "just knocked our socks off as far as price on Serv."

In addition, although the sales people could not testify to the prices paid by Weis Markets for the portion-controlled products purchased from Serv-a-Portion, on a number of occasions where they were shown Weis' invoices, the paperwork revealed that Weis Markets' prices offered to the consumer were lower than Feeser's cost from Serv-A-Portion. Although this does not constitute direct testimony from the salesmen that Serv-A-Portion's pricing policies favored Weis and were detrimental to Feeser's ability to sell Serv-A-Portion's products, this is a reasonable inference which must be drawn in Feeser's favor.

Verification of the information contained in the depositions was presented through affidavits of some of the sales people which were more specific than the depositions that the reason why Feeser either lost sales or incurred reduced profits was because of the lowerprices offered to customers by Weis Markets, Tartan Foods and Sky Brothers.[12]

In his affidavit, Donald Fuller averred that while attempting to sell Serv-a-Portion products at a Holiday Inn,

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[12] Again, inadmissible hearsay was the reason advanced by the district court for refusing consideration of Feeser's sales force affidavits. The basis for exclusion echoed its reasoning concerning the depositions, i.e., that the reasons enunciated by the sales people for lost sales had to do with the customers' motive in not purchasing Serv-A-Portion goods from them and were therefore not relevant. We have already expressed our opinion that the customers' motive was indeed relevant.

his prices were so divergent from those of Weis Markets that, although he initially offered to reduce the price of the products, he later did not even attempt to sell the goods because of his fear of losing credibility. He testified that a similar circumstance precluded him from selling Serv-A-Portion products at a Quality Inn.

Robert Andrews elaborated upon deposition testimony in his affidavit and stated that he did not get the sale of Serv-a-Portion products at the Camp Streamside account because Sky Brothers offered the products to this account at extremely low prices. Furthermore, Andrews testified that whenever he did make a sale of Serv-A-Portion products at this account it was only because he reduced his margins substantially.

Andrews also discussed his transactions at Emil's Diner where he lost sales of Serv-a-Portion products to Sky Brothers despite reducing his profit margin substantially. He related that the buyer at Emil's notified him that Feeser's prices were too high even with the markdown.

Richard Miller, in an affidavit, asserted that he was told by the buyer of Fye's Frosty Cup that Fye's would not buy Serv-A-Portion products from Miller because it received a lower price from Weis Markets.

The evidence we find most persuasive is that of the customers of Feeser, corroborating the sales personnel's testimony, that the reason Feeser lost sales was because its prices for Serv-A-Portion products were not competitive.

For example, one customer-owner of a restaurant, Dean Spanos, testified that prior to 1986 it was his custom to challenge Feeser's prices on Serv-A-Portion products, by informing Feeser that Weis Markets and Sky Brothers were charging much lower prices for the same products. Spanos related that despite Feeser's sales people's efforts, they were unable to match or better the prices and Spanos

decided consistently then to throw his Serv-A-Portion business the way of Weis and Sky.

Feeser also presented deposition testimony from Wilbur Blew, a buyer from one of its largest customers, M. W. Wood. Blew testified that in a five-month period in 1984 Feeser's pricing on Serv-A-Portion products wasconsistently out of line with the prices being offered by Tartan Foods. According to Blew, Feeser eventually reduced its prices in a substantial manner to make the sale of Serv-A-Portion products. Blew indicated that if Feeser had not effectuated this reduction, all of its business with M. W. Wood would have been jeopardized.

William Kotsalos, a buyer for Bill's Restaurant, testified in his affidavit that in the overwhelming majority of instances when he wished to purchase portion-controlled products, he would place his order with Sky Brothers because Feeser's prices for Serv-A-Portion products were much higher.

Examining all of these submissions, we do not conclude, as Serv-A-Portion urges, that the evidence could be summed up as demonstrating de minimis violations of the Robinson-Patman Act.[13] In a similar case, *Rose Confections,*

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[13] The cases cited by the district court to lend credence to its theory that de minimis violations are not actionable are either factually or legally distinguishable.

*See* Rudner v. Abbott Laboratories, 664 F. Supp. 1100 (N.D. Ohio 1987) (although court recognized that there must be more than de minimis violations in both sales and volumes, record was insufficient to analyze factual question in summary judgment motion); Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220, 224 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) (de minimis sales occurred, when as courtesy one distributor extended to another item not in stock); Lupia v. Stelle D'Oro Biscuit Co., Inc., 586 F.2d 1163 (7th Cir. 1978) (question existed whether defendant possessed valid exclusive right to compete in certain geographic area; also, plaintiff unable to identify extent of possible customer dealings or estimate sales actually lost);

*Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987), the plaintiff company's president testified that his company had to reduce its prices in response to low price offers made by its competitors. As in the dispute before us, the plaintiff presented depositions from its sales force concerning the necessity to reduce prices. The Court of Appeals for the Eighth Circuit found that this type of evidence alone is sufficient to allow a reasonable jury to find competitive injury. Also, as stated by the Supreme Court in *Falls City*, where the defendant had argued that other factors may have impacted on lost sales, the Court said that "[i]f some of [plaintiff's] injury was attributed to the price discrimination, [the defendant] is responsible to that extent." 460 U.S. at 437. The depositions and affidavits submitted by Feeser, demonstrating actual instances of lost sales because of its inability to match its competitors' prices on Serv-A-Portion products, go well beyond the level of speculative injury unprotected by section 2(a). The record suffices to raise the inference, at this stage of the proceedings, that the price difference in the Serv-A-Portion products resulted in a reasonable possibility of harm to competition.

The evidence proffered by Feeser, if believed by the trier of fact, would support a finding that competitive harm has occurred.

***Price Difference Over Time***

Although our conclusion concerning the sufficiency of this evidence of lost sales and profits alone necessitates

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Whitaker Cable Corp. v. FTC, 239 F.2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957) (manufacturer selling to 8 ½% of participants in market and who charged different prices to its customers without justification for differential was engaging in activity violative of the Act); Uniroyal, Inc. v. Hoff and Thames, Inc., 511 F. Supp. 1060 (S.D. Miss. 1981) (sales, with $200 combined value, to three customers were de minimis); Dairy King, Inc. v. Kraft, Inc., 645 F. Supp. 126 (D.Md. 1986) (lower prices offered to certain purchasers were in form of discounts offered to first time customers).

remand to the district court on the Robinson-Patman claim, we nonetheless examine the report submitted by Feeser's expert, Dr. Robert Larner, in the context of whether it too could support a Robinson-Patman claim by invoking the *Morton Salt* inference of substantial price difference over a period of time.

The presumption of the requisite adverse competitive effects contemplated by section 2(a) is most likely to arise when the price differential is (1) substantial enough to influence a disfavored customer's resale prices; *see FTC v. Morton Salt*, 334 U.S. at 47; or (2) occurs in a market with low profit margins and intensive competitive conditions; *see Standard Motor Products, Inc. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959). The evidence presented by Feeser's sales personnel is probative of the fact that Feeser was forced to reduce its prices to compete with Weis. Also, the parties agree that the type of market in which it competes is characterized by "low profit margins and intensive competitive conditions." Thus, here the presumption of adverse competitive effects arises and poses a question of fact as to whether Feeser was injured by Serv-A-Portion's pricing policies.

We turn then to the amount and degree of the price discrimination - significant factors used to determine the substantiality of secondary line competitive injury. "A substantial price differential may not by itself be indicative of the requisite injury. Other factors such as the duration and type of the differentials and the nature of the industry may transform a discrimination which is substantial in amount into one which is insubstantial in effect." J.O. Von Kalinowski, 5 Antitrust Laws and Trade Regulation § 31.01[4] (1989).

Dr. Larner's report, which the district court found unpersuasive,[14] tabulated for the period 1982 through 1985

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[14] In most respects, the district court dismissed the opinion of the

the percentage of times Feeser paid a higher price for Serv-A-Portion products than did Weis and the magnitude of this price difference. Appendix A of this opinion sets out Dr. Larner's analysis in full, but we note with specificity here the year 1983 in which Feeser paid 22% more for Serv-A-Portion products than did Weis Markets. When Weis paid the higher price, it paid 9% more. In the remaining years, when Feeser received the disfavored price, it paid less than when Weis received the disfavored price; yet the number of times when Weis received the favored price were far greater than those instances in which Feeser received the favored price.

The comparisons of the Serv-A-Portion transactions in 1984 between Feeser and Tartan Foods and Feeser and Sky Brothers are more dramatic. In that year Feeser paid a higher price for Serv-A-Portion products approximately 80% more often than did Tartan and approximately 75% more often than Sky. When Sky received the favored price, it was 24% lower than the price offered Feeser. In comparison, on the few occasions when Feeser received the favored price, it was only 9% lower than the disfavored prices. Similar, though not as disparate, figures characterize the magnitude of the price difference for Serv-a-Portion products between Feeser and Tartan. *See* Appendix A.

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expert. Although it did not exclude Dr. Larner's report specifically, it rejected each and everyone of its contentions outright. The district court erred first, as it did not make the requisite finding as to whether or not this is the sort of data relied upon experts and Dr. Larner's field in conducting pricing analyses, *see* Indian Coffee Corp. v. Proctor & Gamble Co., 752 F.2d 891 (3d Cir. 1981), and second, because the uncontested figures actually do indicate substantial price discrimination over time. It is clear enough from recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

Another compelling factor considered by courts in determining competitive injury at the customer level is the duration of the price discrimination. Generally, the longer the duration, the more likely injury will be found. *See Rose Confections, Inc.*, 816 F.2d at 385 (seller absorbed freight costs to favored customer's plant for two years); *Hasbrouck v. Texaco*, 842 F.2d at 1041 (price differential in effect for several years). The four-year period analyzed by Dr. Larner's report establishes the requisite duration of price discrimination to support an inference of competitive injury.[15]

We conclude that Dr. Larner's report also presents a question of material fact of competitive injury to Feeser caused by Serv-A-Portion's pricing. For four years, Weis Markets received favored pricing a significant number of times and of a magnitude in a market where the parties

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[15] Feeser's economist, Dr. Larner, also prepared an analysis comparing the average price paid by Weis and Feeser for six key Serv-A-Portion products for a six-month time period in 1984. The products used were identified by Weis as being particularly important in the portion control market, and the time period selected was, according to Larner, a conservative one during which he believed that the extent of the price discrimination against Feeser, and in favor of Weis, was not as great as in other relevant time periods. His analysis revealed that Weis received lower prices than Feeser on five of these six key products, and that Weis' resale prices were lower on each of the five products than were Feeser's *even though Weis had a higher margin than Feeser on four of the products*. Thus, Larner's analysis is capable of supporting the inference that, for this six-month period, Weis was passing on some of the savings it received from Serv-A-Portion, savings that allowed it to charge a lower resale price than Feeser while retaining a higher profit margin. As such, this analysis, especially when coupled with evidence that Weis' cost was the basis for its selling price to customers, is highly probative of competitive injury, *see Morton Salt*, 334 U.S. 37, 47 (1948) (a showing that price discrimination was sufficient in amount to influence resale prices was "in itself . . . adequate to show competitive injury"); and bolsters the evidentiary force of the testimony of Feeser's sales people, and Larner's own less detailed pricing analysis for years 1982-1985.

acknowledge that customer loyalty is compromised at two cents a case. And, for the one year in which discovery was permitted in regard to Tartan Foods and Sky Brothers, the numbers demonstrate that they too were the benefactors of favorable pricing.

Thus, under both tests, proof of lost sales or profits and substantial price difference over time, the record is adequate to defeat the summary judgment motion concerning whether section 2(a) has been violated.

## IV.

Because the record evidence supports the existence of a question of harm to competition under section 2(a), we direct our inquiry to the extent of actual injury incurred under section 4. *J. Truett Payne*, 451 U.S. at 562.

While injury to competition dominates concern in demonstrating a section 2(a) violation, to recover under section 4 a plaintiff must prove a causal connection between the price discrimination and actual damage suffered. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). This actual damage requirement has been construed to impose a burden of proof greater than for a section 2 violation, since under that preventative section, evidence need only establish that injury *may* result. *J. Truett Payne*, 451 U.S. at 562. The plaintiff's proof of damages is facilitated by the rule that once the plaintiff has met its burden of proving the fact of damage, some uncertainty with respect to the amount of damages will not preclude recovery. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) (under Sherman Act). The Supreme Court's traditional rule concerning the exactitude required in proving damage is that antitrust plaintiffs are excused from " 'an unduly rigorous standard of providing antitrust injury.' " *Hasbrouck v. Texaco*, 58 U.S.L.W. at 4814, *quoting J. Pruett Payne*, 451 U.S. at 565.

The Supreme Court rejected the so-called automatic damage theory, that a jury could be permitted to infer the requisite injury and damage under § 4 from a showing of substantial price discrimination, in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 561. While the Supreme Court has lessened the stringency of proof requirements under § 4 because of the difficulties of showing exactly what position the plaintiff would have been in absent the defendant's violations of the antitrust laws, *id.* at 566-67, at least some attempt to link the discrimination to harm to the plaintiff must be made. In *Hasbrouck*, the Court of Appeals for the Ninth Circuit held that damages may not be based on the amount of discrimination, but on estimates of plaintiff's sales absent the discrimination. 830 F.2d at 1521 *quoting J. Truett Payne*, 451 U.S. at 557 (damages awarded on plaintiff's estimate of possible sales minus the violation), *citing Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123-24 (1969);[16] *see also Edward J. Sweeney and Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 118-119 n.6 ("the amount of illegal discrimination can only be used to quantify damages if the plaintiff demonstrates that favored purchasers lowered their prices in an amount equivalent to the illegal benefit they received.").

The less than stringent proof requirements of § 4 are satisfied here by (a) the direct evidence of lost sales dis-

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[16] To estimate its lost sales at trial, Hasbrouck's expert presented a market analysis comparing Hasbrouck's actual prices, volumes and profits to its estimated amount absent the discrimination. The expert utilized economic projections based upon various assumptions such as assuming Texaco did not offer a favored price to its competitors and assuming that Texaco lowered its price to Hasbrouck.

On appeal, the Supreme Court decided that:

> [e]ven if some portion of some of the respondent's injuries may be attributable to the conduct of independent retailers, the expert testimony nevertheless provided a sufficient basis for an acceptable estimate of the amount of damages.

*Hasbrouck*, 58 U.S.L.W. at 4814.

cussed *supra* (b) the evidence that the substantial price discrimination reflected in the resale prices of Feeser and the favored competitors directly resulted in Feeser losing certain sales and losing profits on other sales because it had to cut its margins and (c) Dr. Larner's expert report outlining the magnitude of the price difference. Although Dr. Larner's report did not take the next step and estimate the amount, in dollars and cents, of damages incurred as a result of the price difference, discovery was not extended to this point of calculation.

We recognize that an inference may be drawn, from the wording of the statute, that de minimis violations are *not* actionable: the effect of a price discrimination must be *substantially* to lessen competition. Feeser has, however, by the evidence proffered through the depositions and affidavits and Dr. Larner's report, met its burden of establishing a genuine issue of fact far above the de minimis level as to the existence of the element of the extent of injury caused by Serv-A-Portion's pricing policies to defeat the entry of summary judgment against it.

## IV.

### Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1914), provides, in pertinent part, as follows:

> Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal. . . .

15 U.S.C. § 1. As with the Robinson-Patman Act, for activity to be actionable under the Sherman Act it must result in the type of injury the antitrust laws were intended to prevent and must flow from that which marks the defendant's acts as unlawful. *Atlantic Richfield Co. v. USA Petroleum Co.*, No. 88-1668 (U.S. May 14, 1990)

LEXIS, Genfed Library; U.S. file.[17] As distinguished from the Robinson-Patman Act, the target of this antitrust law is "the protection of competition, not competitors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 329 (1962). *See Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 887 (9th Cir. 1982) ("the Supreme Court has recognized that the price discrimination that results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act, a respect in which the Sherman Act is inconsistent with the aims of the Robinson-Patman Act . . . while appellants point to injury to their particular business, they do not make the necessary showing of a substantially adverse effect on competition in the record market in general" to sustain a Sherman Act claim).

In *Tunis Brothers Co. v. Ford Motor Co.*, 763 F.2d 1482 (3d Cir. 1985), *vacated*, 475 U.S. 1105 (1986), *on remand*, 832 F.2d 49 (1987), *cert. denied*, 484 U.S. 1060 (1988), we found the following four elements necessary to sustain a successful Sherman Act violation:

> (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse anti-competitive effects within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy.

*Id.* at 1489.

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[17] The goals of the Sherman Act and the Robinson-Patman Act also do not mirror one another. In Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 82, 83 n.16 (1979), the Supreme Court noted that price discrimination with advantageous results for buyers versus a competitive edge for sellers encourages the aims of the Sherman Act, and in that respect, can be viewed as inconsistent with the Robinson-Patman Act.

In *Tunis*, on remand from the Supreme Court, we addressed the standard to be employed by district courts on summary judgment motions in antitrust conspiracy cases in light of the Court's then recent decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Particularly relevant to us in *Tunis Brothers*, and of equal importance in the matter *sub judice*, was the Court's statement in *Matsushita* that:

> [I]f the antitrust defendant's conduct is consistent both with permissible competition and illegal conspiracy, evidence of such conduct 'does not, standing alone, support an inference of antitrust conspiracy.' 475 U.S. at ___, 106 S.Ct. at 1357. In such a situation, '[t]o survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of [Sherman Act] § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.' *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984)). In other words, such a plaintiff 'must show that the inference of [illegal] conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [the plaintiff].'

*Tunis Brothers v. Ford Motor*, 823 F.2d at 50.

Thus, under the *Matsushita* standard, we must decide whether the record supports a reasonable inference that Serv-A-Portion's pricing policies resulted from an illegal agreement with Weis Markets rather than independent action by Weis Markets and, if so, whether this concerted activity had an adverse impact on the overall competitive process.

The portion of the record relevant to the element of conspiracy concerns Serv-A-Portion's bid pricing and the activity by Weis Markets in utilizing this system to its advantage. To render a determination as to the possible

inference to be drawn from this evidence, however, whether it be consistent with independent or concerted illegal action, would constitute speculation.

The current record does not disclose the element of illegal conspiracy necessary to sustain a Sherman Act violation. We note that Feeser was instructed by the district court's order to confine its discovery request to competition and injury between itself and other food distributors. As we have recognized, proof of a Sherman Act violation requires the additional element of an illegal conspiracy to exclude a competitor from the market. Feeser, to date, has not had an adequate opportunity to explore the possible existence of this essential element of a Sherman Act claim.[18] Discovery in this case was limited to competitive impact and injury and although we have concluded that Feeser, as the non-movant, has met its burden of producing sufficient evidence to sustain its burden of proof of these elements under the Robinson-Patman Act, we are ill-equipped to render a similar determination under the Sherman Act.

Our inquiry concerning the sufficiency of the evidence to sustain a Sherman Act violation does not end here. We must pursue the issue we found immaterial to our Robinson-Patman discussion-has the activity under scrutiny had

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[18] The dissent notes that the dismissal of Feeser's Sherman Act claim could be affirmed because Feeser's Rule 56(f) affidavit did not adequately outline the additional evidence necessary to demonstrate the presence of the conspiracy. *Diss. Op.* at 4 n.2. Although the dissent correctly states the law of specificity concerning Rule 56(f) affidavits, it is not applicable here. At Serv-A-Portion's request, the district court limited discovery to the elements of competitive injury. Serv-A-Portion's summary judgment motion was directed only to the issue of damage to competition, it would be unfair to impose upon Feeser an obligation to specify the type of evidence it needed to uncover to substantiate the conspiracy element of its Sherman Act claim when it was without notice that the district court intended to consider and resolve the entire Sherman Act claim.

the requisite anti-competitive effect on the food distribution industry? In this market competition is intense and we must decide whether, within this purview, there is sufficient evidence to demonstrate a question of fact as to whether the vitality of the competition among the participants in the market has been dissipated.

The injury to Feeser has already been discussed. In addition to the uncontested fact that Serv-A-Portion offered different prices to Feeser than it did to Weis, Tartan Foods and Sky Brothers, the record also reveals discriminatory pricing to other non-party competitors as well. Joanne Straw testified by affidavit that her company, W.R. Straw, Inc., lost sales of Serv-A-Portion products to Pennsylvania State University because Weis Markets' prices to Penn State were lower than Straw's costs from Serv-A-Portion. Joseph Spagnola, a buyer for R&R Provision Company, another participant in the relevant market, testified that he received complaints from his salespeople that they were losing sales of Serv-A-Portion products to Weis Markets because R&R's prices were too high. His investigation revealed that Weis' resale prices on Serv-A-Portion products were as low as R&R's costs for identical Serv-A-Portion products. We are aware that the district court rejected this testimony because it constituted hearsay based upon information from Spagnola's salespeople, but the district court erred in this regard.

In *Williams v. Borough of West Chester*, 891 F.2d 458 (3d Cir. 1989), we noted that Fed. R. Civ. P. 56(e) requires the production, at the summary judgment stage, of evidence " 'as would be admissible at trial' . . . and thus 'reduc[ible] to admissible evidence.' " *Id.* 466 at 12. We cited *Celotex v. Catrett*, however, in which the Supreme Court rejected the view that the non-moving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. 477 U.S. at 324. We thus concluded that hearsay evidence produced in an affidavit opposing summary judgment may be considered if

the out-of-court declarant could later present the evidence through direct testimony, i.e., in a form that "would be admissible at trial." *Williams*, 891 F.2d at 465-66 n.12. Here, there is no indication that Spagnola's salesforce would be unavailable to testify at trial. The averments of Spagnola's affidavit are capable of proof through admissible evidence and we will consider them now on de novo review.

Reviewing these affidavits, we conclude that Feeser has presented sufficient evidence to raise the inference that competition has been harmed by Serv-A-Portion's discriminatory pricing practices. When three participants in a limited market aver that they were unable to sell their products to customers because other favored competitors were offering better prices to these customers based on lower costs from Serv-A-Portion, damage to the vitality of the market has been adequately demonstrated for summary judgment purposes. Feeser's demonstration of an overall anti-competitive impact, in combination with the limited opportunity for discovery, compels us to vacate the grant of summary judgment on this Sherman Act claim and to remand to permit further discovery.

## V.

As described in the complaint, Juniata Foods, Inc., is a food distribution business located in Lewistown, Pennsylvania. Juniata is commonly owned with Feeser.

The district court, in a footnote, dismissed Juniata from the lawsuit because it accepted the contention of Serv-A-Portion that Juniata never purchased products directly from Serv-A-Portion. The court determined that the law of this circuit dictates that the plaintiff be a direct purchaser before it may assert a Robinson-Patman claim.

Our controlling cases on this question of standing are *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956) and *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d

105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). In *Klein*, the district court granted summary judgment in favor of the defendant on the ground that because the plaintiff retailer bought the defendant's products through wholesalers and jobbers, it had no cause of action against the defendant. We affirmed, holding that a retailer who purchased electric toy trains and accessories from a middleman was not a "purchaser" within the meaning of the Clayton Act. *Id.* at 15. We subsequently affirmed our holding in *Klein in Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d at 122, when we dismissed claims for damages against the seller by companies who purchased goods only from a direct buyer of the defendant-seller and not directly from the defendant itself.

Although the district court correctly stated the law of standing, we note that the record does not resolve the question of whether Feeser was in fact an indirect purchaser. Feeser points to evidence proffered by it that Juniata had for many years acquired Serv-A-Portion products with Serv-A-Portion's full knowledge and consent by consolidating its purchases with those of its sister corporation, Feeser. Feeser characterized this aspect of its relationship with Juniata as that of a purchasing agent. Specifically, Feeser refers to the affidavit of John M. Tighe, the controller of both Feeser and Juniata.[19] Tighe avers that Feeser and Juniata are managed by an identical core of senior executives ultimately responsible to a single individual, Lester Miller, the president and sole shareholder of both companies. Tighe then claims that in 1975, Serv-A-Portion agreed with Feeser and Juniata that in order to maximize efficiency all shipments of Serv-A-Portion

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[19] Serv-A-Portion moved to strike the Tighe affidavit. In its order granting summary judgment the district court dismissed, save one, all of Serv A-Portion's motions to strike as moot. In light of our decision that there exists material issues of fact, the findings of mootness concerning the evidentiary questions, newly viable, are necessarily dissolved.

products would be delivered to Feeser in Harrisburg and all invoices would be billed through a centralized selling and shipping system. Accompanying this system, according to Tighe, was an understanding that a portion of the products sent to Feeser would be redelivered by Feeser to Juniata.

Serv-A-Portion asserts that certain invoices indicate that not only did Juniata buy Serv-A-Portion products from Feeser, but that it paid a premium price for the products acquired from Feeser. Serv-A-Portion argues that to credit Juniata's classification as anything other than as an indirect purchaser is legally indefensible as it would result in a spread of Robinson-Patman liability throughout the distribution chain.

A material fact here is the method by which Juniata acquires its portion-controlled products from Serv-A-Portion. Although the Tighe affidavit is persuasive, the record presents conflicting evidence. Thus, this question of Juniata's standing was improperly resolved at the summary judgment stage and Juniata will be reinstated as a party plaintiff in this litigation.

## VI.

### *Conclusion*

The order of a district court granting summary judgment in favor of Serv-A-Portion will be vacated and the case remanded for further proceedings consistent with this opinion. The pendent state claims, dismissed because the federal question claims were resolved, will be reinstated.

## APPENDIX A

### *FEESER & WEIS*

| Year | Feeser Paid Higher Price than Weis (%) | Feeser Paid Lower Price than Weis (%) | Feeser and Weis Paid Same Price (%) | # of Comparisons |
|---|---|---|---|---|
| 1982 | 51.10 | 14.84 | 34.07 | 182 |
| 1983 | 63.18 | 15.92 | 20.90 | 201 |
| 1984 | 61.00 | 29.88 | 9.13 | 241 |
| 1985* | 66.67 | 23.15 | 10.19 | 216 |

*The 1985 figures include January of 1986.

### *FEESER & TARTAN*

| Year | Feeser Paid Higher Price than Tartan (%) | Feeser Paid Lower Price than Tartan (%) | Feeser and Tartan Paid Same Price (%) | # of Comparisons |
|---|---|---|---|---|
| 1984 | 79.38 | 14.4 | 6.23 | 257 |

### *FEESER & SKY BROTHERS*

| Year | Feeser Paid Higher Price than Sky Bros. (%) | Feeser Paid Lower Price than Sky Bros. (%) | Feeser and Sky Bros. Paid Same Price (%) | # of Comparisons |
|---|---|---|---|---|
| 1984 | 74.72 | 19.10 | 6.18 | 178 |

## APPENDIX A

**(Continued)**

**Magnitude of Price Difference**

| | Feeser & Weis | | Feeser & Sky Bros. | | Feeser & Tartan | |
|---|---|---|---|---|---|---|
| Year | %by which Price to Feeser Exceeded Price to Weis | %by which Price to Weis Exceeded Price to Feeser | %by which Price to Feeser Exceeded Price to Sky Bros. | %by which Price to Sky Bros. Exceeded Price to Feeser | %by which Price to Feeser Exceeded Price to Tartan | %by which Price to Tartan Exceeded Price to Feeser |
| 1982 | 0.09 | 0.11 | | | | |
| 1983 | 0.22 | 0.09 | | | | |
| 1984 | 0.15 | 0.15 | 0.24 | 0.07 | 0.20 | 0.12 |
| 1985* | 0.11 | 0.16 | | | | |

*The 1985 figures include January of 1986.

(Doc. No. 142, Exhibit C).

STAPLETON, *Circuit Judge*, concurring and dissenting:

I agree with the court that the defendants were not entitled to summary judgment on the plaintiffs' secondary-line Robinson-Patman Act claim. However, I respectfully dissent from the court's reversal of the summary judgment in favor of the defendants on plaintiffs' Sherman Act claim. Because Feeser has not met its burden of producing evidence tending to show that the challenged price discrimination affected competition in a relevant market as required under § 1 of the Sherman Act, 15 U.S.C. § 1, I would affirm the summary judgment entered against Feeser on its second claim.

As the court finds, the language of § 2(a) of the Robinson-Patman Act, its legislative history, and Supreme Court precedent interpreting it compel the conclusion that a victim of secondary line price discrimination may show "competitive injury" regardless of the general health of the

victim's business or the market in which the victim operated. Moreover, as the court's opinion also demonstrates, Feeser met its burden of producing evidence tending to show a reasonable possibility that Serv-A-Portion's discriminatory pricing practices are harmful to competition between Feeser and the beneficiaries of that discrimination. *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). It did this both by presenting direct evidence of lost sales, and by producing sufficient evidence of a substantial price discrimination between itself and its competitors over time, so as to implicate the *Morton Salt* inference. *Id.* In the latter regard it is especially significant that Feeser has produced evidence indicating that Serv-A-Portion's discriminatory pricing was passed on by its favored distributors in the form of lower resale prices. *FTC v. Morton Salt*, 334 U.S. 37, 47 (1948) (a showing that price discrimination was sufficient in amount to influence resale prices was "in itself . . . adequate to show competitive injury"). Finally, by its evidence of lost sales alone, Feeser has produced sufficient evidence to meet its burden at the summary judgment stage of creating a genuine issue of material fact as to whether the challenged price discrimination actually injured it for purposes of § 4 of the of the Clayton Act. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9 (1969) (the "burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by . . . proof of some damage flowing from . . . [the antitrust violation]; inquiry beyond this point goes only to the amount and not the fact of damage"); *Falls City*, 460 U.S. at 437 (if some of a plaintiff's injury is attributable to price discrimination, defendant is responsible to that extent).[1] I also agree that

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[1] I cannot agree with the court's suggestion that there are "*de minimis* violations" of the Robinson-Patman Act that do not count as such. I acknowledge that circumstances may exist where price differentials are so *de minimis* that they could not create a reasonable possibility that competition between the favored and disfavored purchasers would

there is a genuine dispute as to whether Juniata can be considered a "purchaser" with standing to sue under our precedent in *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956), and *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), and that the district court therefore erred in entering summary judgment against Juniata on this ground.

I part company with the court, however, when it concludes that Feeser has tendered sufficient evidence to raise a genuine issue of material fact as to whether the price discrimination at issue in this case caused an adverse, anti-competitive effect in a relevant market for purposes of § 1 of the Sherman Act. To the contrary, Feeser failed to make any significant response to Serv-A-Portion's summary judgment argument that Feeser was unable to show an injury to competition in a relevant market. In particular, Feeser introduced no market analysis of any kind purporting to show that Serv-A-Portion's discriminatory pricing arrangement with Weis (assuming such an agreement existed)[2] produced an adverse, anti-competitive effect

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be harmed. Where, however, " 'the record indicates a price differential substantial enough to cut into the purchaser's profit margin . . . [or one] that, if reflected in a resale price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may be properly indulged.' " *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1153 (D.C. Cir. 1988) (Mikva, J. dissenting), (quoting *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir. 1965)).

[2] As was the district court, I am willing to assume, for purposes of analyzing whether Feeser has produced sufficient evidence of adverse competitive impact under § 1 of the Sherman Act, that the agreement alleged in Feeser's complaint existed, i.e., a conspiracy between Serv-A-Portion and Weis whereby Weis would receive more favorable prices than Feeser. However, if an independent ground for affirmance were not available, affirmance might well be appropriately based on the lack of record evidence of a conspiracy, given that discovery in this case went on for over a year prior to the order limiting discovery to issues of competitive injury, and Feeser's Rule 56(f) affidavit did not indicate

within a relevant product and geographic market. This left the record silent with respect to an essential element of Feeser's § 1 claim.

A vertical restraint, such as an agreement between Serv-A-Portion and Weis to deal with each other on more favorable terms than Serv-A-Portion would deal with Feeser, is not a *per se* violation of § 1, but must be dealt with under a rule of reason analysis. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (vertical restraints, such as an agreement between a manufacturer and a dealer to terminate another "price cutting" dealer, are not *per se* violations of § 1 absent an agreement between the conspiring dealer and the manufacturer as to the resale prices); *Alliance Shippers v. Southern Pacific Transportation Co.*, 858 F.2d 567, 570 (9th Cir. 1988) ("vertical arrangements resulting in price discrimination are not *per se* violations of the Sherman Act"); *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 375 (3d Cir. 1985) ("that a manufacturer may give preferential pricing and delivery terms to one distributor does not establish a *per se* violation of section 1 of the Sherman Act even though other distributors suffer losses in sales").

Under a rule of reason analysis, a vertical restraint violates § 1 only if either its purpose or its effect is to

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what additional discovery it needed to uncover evidence of an illegal agreement. *See Dowling v. City of Philadelphia*, 855 F.2d 136 (3d Cir. 1988) ("This court has interpreted Rule 56(f) as imposing a requirement that a party seeking further discovery in response to a summary judgment motion submit an affidavit specifying, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained."); *see also, Hancock Industries v. Schaeffer*, 811 F.2d 225, 230 (3d Cir. 1987); *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir. 1986); *Mid-South Grizzlies v. National Football League*, 720 F.2d 772, 781 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). Feeser was thus well apprised of the need to produce adequate evidence on this element of its claim, and filed a, albeit inadequate, Rule 56(f) affidavit to respond to this portion of Serv-A-Portion's motion.

adversely affect competition in a relevant market. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 26 (3d Cir.) ("[I]n the context of § 1's prohibition of conspiracies in restraint of trade, except where practices fall under a judicially created *per se* ban, a finding of illegality presupposes a determination in any given case that the effect upon competition in the marketplace is substantially adverse.") (quotations omitted), *cert. denied*, 439 U.S. 876 (1978); *accord Garshman v. Universal Resources Holding, Inc.*, 824 F.2d 223, 231 (3d Cir. 1987); *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d 1482, 1490 (3d Cir. 1985), *vacated on other grounds*, 475 U.S. 1105 (1986); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1346 (3d Cir. 1975). Thus, unlike the Robinson-Patman Act, the Sherman Act protects competition in the marketplace and not individual competitors harmed by price discrimination. *Monohan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 529 (1st Cir. 1989).

As a result, Feeser cannot defeat summary judgment by merely showing that Feeser and other disfavored distributors lost sales because Weis, Tartan and Sky were able to offer lower prices to end users of Serv-A-Portion portion control products as a result of the pricing advantage they received from Serv-A-Portion, and that Serv-A-Portion realized that this would occur. *Seaboard Supply Co.*, 770 F.2d at 375; *Monohan's Marine, Inc.*, 866 F.2d at 525 (where favoritism in prices for certain dealers was not likely to concentrate the relevant market or drive smaller dealers out, the fact that a disfavored dealer was harmed did not render a price discrimination agreement unreasonable under § 1); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 887 (9th Cir. 1982) (indicating "that the price discrimination which results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act, a respect in which the Sherman Act is in-

consistent with the aims of the Robinson-Patman Act," and affirming a grant of summary judgment against a plaintiff victimized by price discrimination where plaintiff did not show an adverse effect on competition in the relevant market), *cert. denied*, 460 U.S. 1085 (1983). The Sherman Act is not offended by unfair subsidies to some competitors that result in a price war and diminished profits for some disfavored competitors, unless those subsidies lead to diminished price competition in the relevant market and higher prices for consumers. *AAA Liquors, Inc. v. Joseph E. Seagram & Sons*, 705 F.2d 1203, 1207-08 (10th Cir. 1982) (section 1 allows a supplier to start a "price war," and does not require suppliers to offer the same prices to customers in a given geographical area, absent a purpose to exclude disfavored buyers from the relevant market or some adverse effect on competition in that market), *cert. denied*, 461 U.S. 919 (1983); *cf. Tunis Bros. Co., Inc. v. Ford Motor Co.*, 763 F.2d at 1490 n. 13 ("[I]n addition to showing the existence of a conspiracy or combination, plaintiffs must show an adverse impact on competition to prove a section 1 claim. The termination of a dealer or rejection of a dealer application, even if done unfairly, does not by itself establish injury to competition.").

Because the Sherman Act protects competition and not competitors, Feeser had to show that the complained of price discrimination had an adverse effect on competition in a relevant market defined by product and geographic scope.[3] On the record before us, however, it would be

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[3] The record is unclear as to the precise geographic area allegedly affected by the unlawful agreement alleged by Feeser. Nor is it apparent whether Feeser contends that the product market is all portion control products or whether it contends that Serv-A-Portion portion control products can in themselves constitute a product market for § 1 purposes. *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 27 (3d Cir. 1978) (quoting *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962)) ("The outerbounds of a

impossible to rationally conclude that Serv-A-Portion's pricing practices were intended to[4] or were likely to lead to a substantial lessening of competition in some desig-

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product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."). Feeser does advance the proposition that Serv-A-Portion products occupy a unique niche in the portion control market because of their combination of moderate price and good quality. This proposition suggests that if Serv-A-Portion's distributors fail to maintain their prices at a reasonable level, end users will either switch to higher quality products (made price competitive because of Serv-A-Portion increased prices) or considerably cheaper products (the rise in Serv-A-Portion's prices not being justified by the quality difference between its products and cheaper ones).

[4] With respect to intent, Feeser's amended complaint alleges only an agreement to engage in price discrimination, and does not allege that this agreement was designed to drive it from the portion control product market altogether. Compare *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir. 1975) ("A combination of distributors, which through unfair practices eliminates a competitor and leaves it in such a condition that it lacks the ability to continue business as an interbrand competitors, has an adverse effect on competition.").

In its briefs to the district court and this court, Feeser has, at best, vaguely alleged that Serv-A-Portion intended to hamper Feeser's ability to compete with Weis in sales of Serv-A-Portion's portion control products. No record evidence supports this assertion, however. Further, the proposition that Serv-A-Portion would intend to do this seems facially implausible. As Judge Breyer has explained, a "supplier himself typically has an economic interest in encouraging competition among his dealers, and thus preventing the emergence of any 'dealer monopoly.' Other things being equal, a profit-maximizing dealer monopolist would set retail prices that, from the supplier's perspective, are too high and unduly restrict the product's sales." *Monohan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 526 (1st Cir. 1989); *see also Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 56 & n. 24 (1977) (indicating that economists believe that once a manufacturer sets its own price, the manufacturer desires intrabrand competition among its distributors since this leads to lower retail prices and increased sales). Most important, as I discuss *infra*, even if Serv-A-Portion intended to give Weis an unfair advantage over Feeser, this would not violate § 1 unless it was part of a plan to cause some adverse effect on competition

nated market. Indeed, there is nothing in the record indicating that the complained of price discrimination did anything other than spark a vigorous round of competition in a portion control market which was already extremely competitive. Nothing in the record indicates that disfavored distributors like Feeser could not easily transfer to another manufacturer of portion control products. The only disfavored distributor that dropped Serv-A-Portion portion control products was R & R, and R & R did not retreat from competition with Weis in the portion control market. Instead, it began to distribute other brands of portion control products, and thus increased interbrand competition in the relevant market. The fostering of just such competition is, of course, the "primary concern of the antitrust laws." *Business Electronics Corp.*, 485 U.S. at 726.[5] Nor is this a case where a plaintiff without market power was disfavored by an agreement between a supplier and a powerful distributor who forced the agreement on the supplier so as to harm the plaintiff. There is no evidence that Feeser is smaller than Weis or has less market power than Weis. *Monohan's Marine*, 866 F.2d at 529.

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in a relevant market. The Sherman Act is not designed as a general prohibition on unfair business practices, it is designed to protect consumers and absent some purpose to harm them or some adverse effect upon their interests, the Act is not concerned with harm to a particular competitor.

[5] See also *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 52 n. 19 ("Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law. . . . The degree of intrabrand competition is wholly independent of the level of intrabrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.").

Rather, the only inference that could be drawn from this record would be that the discriminatory pricing was unlikely to have an adverse effect on the portion control market (1) because disfavored distributors like Feeser could easily begin to distribute other brands of product control products; (2) because Serv-A-Portion, according to Feeser, favored not one, but three distributors of its own products and both the intrabrand competition among them and the interbrand competition in the market would prevent them from exploiting their status in a way that would hurt consumers; and (3) because there are no discernible barriers to entry to this market.

I thus conclude that the present record does not reflect a material dispute of fact as to whether the alleged agreement between Serv-A-Portion and Weis had an adverse impact on competition in a relevant market. I would affirm the judgment in favor of the defendants on the Sherman Act claim.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## No. 89-5729

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J. F. FEESER, INC., and JUNIATA FOODS, INC.,
Appellants

vs.

SERV-A-PORTION, INC; HUNT-WESSON FOODS, INC; and WEIS MARKETS, INC; MARK CRANE, MEDIATOR, SKY BROTHERS, Movant

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**(D. C. Civil No. 85-00684)**

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**Present:** STAPLETON and MANSMANN, Circuit Judges and ACKERMAN, District Judge*

### AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel February 1, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court granting summary judgment in favor of Serv-A-

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* Hon. Harold A. Ackerman of the U. S. District Court for the District of New Jersey, sitting by designation.

Portion, be, and the same is hereby vacated and the cause remanded for further proceedings consistent with the opinion of this Court. It is further ordered and adjudged that the pendent state claims dismissed because the federal question claims were resolved are reinstated. Costs taxed in favor of Appellants.

ATTEST:

/s/ Sally Mrvos
Clerk

September 19, 1990

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**No. 89-5729**

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FEESER, *et al.*
vs.
SERV-A-PORTION, INC., *et al.*

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**SUR PETITION FOR REHEARING**
**Present: HIGGINBOTHAM, Chief Judge, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and ALITO, Circuit Judges, and Ackerman.***

The petition for rehearing filed by Respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

[Stamped September 19, 1990]

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* Judge Ackerman voted only as to panel rehearing.

## APPENDIX D

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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## CIVIL ACTION NO. 85-0684

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J. F. FEESER, INC., and JUNIATA FOODS, INC.,
*Plaintiffs*

vs.

SERV-A-PORTION, INC., HUNT-WESSON FOODS, INC., and WEIS MARKETS, INC.,
*Defendants*

## MEMORANDUM

### I. *Introduction*

Defendant, Serv-A-Portion, Inc. (Serv), has moved for summary judgment in this antitrust action charging it with violating section 2 of the Clayton Act, as amended by the Robinson-Patman Act, *see* 15 U.S.C. § 13(a), and section 1 of the Sherman Act. 15 U.S.C. § 1. Pendent state claims have also been made. Plaintiffs, J. F. Feeser, Inc. (Feeser), and Juniata Foods, Inc. (Juniata), oppose defendant's motion.[1]

Recent Supreme Court and Third Circuit decisions guide our consideration of Serv's motion.

> A trial court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no gen-

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[1] The claims against defendant, Hunt-Wesson Foods, Inc., have been settled.

> uine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "As to materiality, the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).
>
> The burden to demonstrate the absence of material fact issues remains with the moving party regardless of which party would have the burden of persuasion at trial. If, however, the nonmovant will bear the burden of persuasion at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial. *See Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986)

*Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987).

The evidence must be reviewed in the light most favorable to the plaintiffs, the non-moving parties, and all reasonable inferences must be drawn against Serv, the moving party. *See McGlinchey v. Hartford Accident and Indemnity Co.*, 866 F.2d 651, 653-54 (3d Cir. 1989). Nevertheless, if a reasonable jury could not find for plaintiffs on the evidence presented, we must enter summary judgment for defendant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

## II. *Background.*

Plaintiffs, Feeser and Juniata, along with defendant Weis, are institutional food distributors. They sell certain food products to schools, government agencies, hospitals, caterers, restaurants, and nursing homes. Feeser has some

3,000 of these institutional consumers of food products as clients in its sales area of Pennsylvania and portions of New Jersey, Delaware, Maryland, Virginia and the District of Columbia. Juniata is headquartered in Lewistown, Pennsylvania, and sells to clients located in central Pennsylvania. Weis is located in Sunbury, Pennsylvania, and sells to customers in Pennsylvania, New York and Delaware. The three companies compete for the sale of food products to the institutional end user. It is a highly competitive business and the end user is sensitive to price differences between competing sellers. (*See, e.g.*, Doc. No. 140, Blew deposition, p. 87, 95-97; Doc. No. 143, Spanos affirmation, ¶ 5, Kotsalos affirmation, ¶ 2; Doc. No. 167, Clapper declaration). Defendant Serv manufactures portion control products, such as the individual servings of condiments often seen in restaurants, and sells them to these and other food distributors.

Plaintiffs contend that from 1982 through 1986 Serv discriminated against them in the price it charged for its portion control products and in favor of defendant Weis and two other distributors, Tartan Foods, Inc. ("Tartan") and Sky Brothers, Inc. ("Sky Brothers"). As a result, plaintiffs lost sales and had reduced profits. They seek treble damages under the antitrust laws.

## III. *Discussion.*

### A. *The Robinson-Patman Claim.*

15 U.S.C. § 13(a) provides, in pertinent part, as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . and where the effect of such discrimination may be substantially to lessen competition . . . or to injure, destroy or prevent competition with any person who either

> grants or knowingly receives the benefit of such discrimination . . . .

By order of court, dated November 18, 1986, (Doc. No. 49), discovery was limited mainly to injury to competition and injury to the plaintiffs. Defendant's motion has concentrated on these elements, arguing that plaintiff has not made a showing as to either.

There are some well established criteria for determining whether injury to competition has occurred. A plaintiff need not show that competition was in fact injured by the discriminatory pricing. It is sufficient to show "a reasonable possibility that a price difference may harm competition." *Falls City Industries, Inc, v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35, 103 S.Ct. 1282, 1288, 75 L.Ed.2d 174, 186 (1983). More specifically, injury to competition is usually shown in either of two ways. First, under the *Morton Salt* test, a plaintiff can provide "proof of a substantial price discrimination between competing purchasers over time." *Id.* at 435, 103 S.Ct. at 1289, 75 L.Ed.2d at 186 (citing *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948)). Alternatively, a plaintiff can provide direct proof of lost sales or profits. *Falls City Industries, supra; Rose Confections, Inc, v Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987).

Defendant, however, has taken a different approach to the issue of competitive injury. Relying upon *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988), Serv argues that the overall competitive health of plaintiffs, and of institutional food distributors in Pennsylvania and the rest of the nation, establishes that there can be no competitive injury for Robinson-Patman purposes. In defendant's view, overall competitive health negates a Robinson-Patman claim irrespective of the presence of discriminatory pricing or lost sales or profits. Defendant has submitted the affidavit of Donald A. Karas to support this claim. Mr. Karas, a publisher in the institutional food distribution industry, ig-

noring individual pricing and looking only at total growth, estimates that: (1) food service distributors nationwide grew at a 10% annual rate from 1981 through 1987; (2) sales for Pennsylvania distributors grew 80% from 1981 through 1987; (3) Pennsylvania has ninety new distributors and (4) Feeser's growth in the sale of Serv products was greater than Weis' or Sky Brothers'. (Doc. No. 130, Karas declaration, ¶¶ 26, 28, 29,33).

In *Boise Cascade*, the District of Columbia Court of Appeals, in remanding an action to the Federal Trade Commission (FTC) for further analysis of the competitive injury element of a Robinson-Patman case, stated that the analysis should include consideration of the general competitive state of the industry and the business health of the allegedly injured competitors. Specifically, the court noted:

> In its opinion, the FTC waved aside substantial evidence (1) that competition among dealers generally was healthy, (2) that the selected dealers singled out for FTC examination were thriving, and (3) that this happy picture of prosperity was apparently unclouded by instances of diverted sales attributable to the challenged discounts. The Commission flatly concluded that this entire body of evidence was *irrelevant*. Indeed, in the Commission's view, for reasons that we fail to discern and the FTC failed to articulate, this evidence did "not address the causal connection [between the price differentials and competitive injury] at all." *Commission Decision*, J.A. at 191. This cannot be. In our view, the Commission's conclusion that Boise's dealer-specific evidence was irrelevant to the inference of competitive injury is wrong as a matter of law.

827 F.2d at 1143-44 (emphasis and brackets in original).

The FTC had relied solely upon the *Morton Salt* test to establish competitive injury but the appellate court concluded there could be no competitive injury if competition was healthy to begin with. This, in turn, could largely be established, in part, by showing that competition and competitors were thriving.

In response, plaintiffs would not attach any great significance to *Boise Cascade*. They view it simply as a procedural decision with the court remanding merely for the FTC to evaluate the evidence of healthy competition it had ignored in its initial decision. Plaintiffs also point out that *Boise Cascade* involved a duel distributorship situation, an element absent from the case at bar.

As illustrated by the dissenting opinion in *Boise Cascade*, the majority's position was not a procedural one. Rather, its reliance upon healthy competition was a substantive approach to the Robinson-Patman claim. We have carefully examined the majority and dissenting opinions. Since both excellently detailed their respective positions, it suffices for us merely to state our belief that the dissent correctly interpreted leading Supreme Court decisions such as *Morton Salt* and *Falls City Industries*. It is the approach we will use. It is also consistent with Supreme Court precedent. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 87 S.Ct. 1326, 18 L.Ed.2d 406 (1967) (a competitor's sales growth does not rule out a Robinson-Patman claim). Accordingly, industry-wide competitive health will not be dispositive of the occurrence *vel non* of a Robinson-Patman injury here.

We would also note an element of the *Boise Cascade* case which was apparently crucial to the concurring opinion and which supports the plaintiffs' argument distinguishing *Boise Cascade* from the instant case. In *Boise Cascade*, the pricing policy under attack gave so-called functional discounts to dual distributors, i.e., distributors not only making retail sales of office products but also

reselling a certain minimum percentage at wholesale. To qualify as a dual distributor, and for the functional discount, a distributor had to wholesale a minimum percentage of its purchases of office products. As long as these resales were occurring the dual distributor could not have been benefitting economically from the discount since no rational manufacturer would give away such a benefit in an area where it could be expected to be in direct competition with the dual distributor. In the instant case, there are no dual distributors and plaintiffs' competitors such as Weis and Tartan are allegedly using the favored pricing to compete directly for retail sales to the ultimate consumer. The possibility of injury to competition is greater in the latter circumstances.

We turn now to a consideration of plaintiffs' evidence under the alternative tests set forth above.[2]

### 1. *Lost Sales or Profits Caused by the Price Differential. The Salesmen's Depositions.*

Plaintiffs have presented voluminous excerpts from deposition testimony of their salesmen to support their claim that they lost sales of food products to Weis and the other favored competitors because of higher prices charged for Serv's portion control products. We have examined this evidence and we agree with defendant Serv that a con-

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[2] Defendant contends that Juniata lacks standing to assert a Robinson-Patman claim since it never purchased products directly from Serv. Rather, Feeser made the purchases and resold the products to Juniata. The Third Circuit has required a plaintiff to be a direct purchaser to assert a Robinson-Patman claim. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911, 101 U.S. 1981, 68 L.Ed.2d 300 (1981); *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956). Plaintiffs counter with cases from other jurisdictions which have permitted indirect purchasers to sue for Robinson-Patman violations. *See, e.g., Schwimmer v. Sony Corp.*, 637 F.2d 41 (2d Cir. 1980). We conclude that Third Circuit case law dictates that Juniata has no standing to assert the Robinson-Patman claim and its claim in this regard will be dismissed.

siderable part of the testimony is incompetent hearsay. Typically, while the salesman will testify to lost sales, the stated reason for the loss will be that the customer's agent told him that Weis' prices were better. (*See, e.g.*, Doc. No. 144 tabs 1, 3, 4, 6, 22, 23, 29, 33, 36, 41, 47, 50; Doc. No. 169, tabs 2, 5, 6, 7, 9, 13, 19; Doc. No. 174, tabs 1, 2, 4, 6, 16, 20, 22, 24, 26, 30).

Plaintiffs assert that the hearsay statements are admissible pursuant to Fed. R. Evid. 801 and 803(3) to show the reason why the customer refused to purchase the products from them. They cite *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918 (3d Cir.1986); *Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118 (2d Cir. 1980), *cert. denied*, 456 U.S. 989, 102 S.Ct. 2267, 73 L.Ed.2d 1283 (1982), and *Herman Schwabe, Inc, v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962) in their support. Plaintiffs would be correct if the customer's motive was relevant to this action. In *Link, supra*, for example, time guides for car repair services, prepared by other auto manufacturers, were admissible, not to prove the truth of the matters asserted in the guides, but to disprove a conspiracy between the defendant manufacturer and its dealers in the use of repair guides. The other guides tended to show the existence of an industry practice which supported a defense of independent conduct on the part of the dealers rather than concerted action. In the instant case, on the other hand, plaintiffs have not argued a relevant, non-hearsay purpose for the customers' statements. The statements are relevant solely for the truth of the matters asserted therein - that Weis' prices were lower than plaintiffs'. It is therefore hearsay and cannot be relied upon.

Other salesman's depositions are simply too vague, conclusory, or incomplete for a reasonable jury to rely upon them. (*See* Doc. No. 144, tabs 11, 13, 14, 16, 17, 19, 20, 21, 30, 31, 35, 39; Doc. No. 169, tabs 3, 4, 6, 11, 12, 16,

17, 18, 19, 20, 25, 26; Doc. No. 174, tabs 3, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 19, 25, 27, 28, 29, 33, 34, 37).

Not all of the depositions are incompetent. Some of them are probative of lost sales due to better prices offered by favored competitors - which we will assume for the sake of argument resulted from Serv's pricing. (*See* Doc. No. 144, tabs 7, 15, 18, 32 (the testimony of Wilbur Blew)[3], 42, 43; Doc. No. 169, tabs 10, 22; Doc. No. 174, tabs 15, 31, 36.) It would have been unusual indeed, given the number of customers and transactions encompassed by plaintiffs' cause of action, for plaintiffs not to be able to produce some evidence of discriminatory pricing. But we believe that there must be more than *de minimus* violations of the Robinson-Patman Act in both volume and price before competitive injury can be found. See *Rudner v. Abbott Laboratories*, 664 F.Supp. 1100 (N.D. Ohio 1987) (citing *Hanson v. Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 224 (5th Cir.1973)), *cert. denied*, 414 U.S. 1136, 94 S.Ct. 880, 38 L.Ed.2d 761 (1974); *Whitaker Cable Corp. v. F.T.C.*, 239 F.2d 253, 256 (7th Cir. 1957), *cert. denied*, 353 U.S. 938, 77 S.Ct. 813, 1 L.Ed.2d 76 (1954); *Uniroyal v. Hoff and Thomas, Inc.*, 511 F.Supp. 1060, 1068-69 (S.D.Miss.1981). *See also Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1171 (7th Cir. 1978) ("[I]f there exists only 'de minimus' or sporadic competition, it is unlikely that a 'lessening of competition' or 'tendency to create a monopoly' will occur.") (brackets added) (quoting *Universal Rundle Co. v. FTC*, 382 F.2d 285, 287 (7th Cir. 1967)), *cert. denied*, 440 U.S. 982, 9 S.Ct.1791, 60 L.Ed.2d 242 (1979). The customers involved in these sales make up only a small fraction of plaintiffs' total number of customers. No negative impact upon competition can be inferred from this small percentage. After all, and to this extent we agree with the majority in *Boise Cascade*, "in-

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[3] See also Doc. No. 174, tab 22 (Blew deposition).

jury to competition is "the name of the Robinson-Patman game." *Boise Cascade, supra*, 837 F.2d at 1143.

***The Plaintiffs' Employee Affidavits***

Plaintiffs have also submitted the affidavits of some of their salesmen in an attempt to supplement their deposition testimony. (Doc. No. 143). Donald R. Fuller, a Feeser salesman, avers in his affidavit that he could not sell to the Holiday Inn in Williamsport, Pennsylvania, "because our prices were much higher than the prices offered by Weis Food Service" and, because they "consistently lost sales even at a very low markup," he stopped reducing his price in a futile attempt to make sales. (¶ 3) Fuller also asserted that he could not make sales at the Quality Inn in Danville, Pennsylvania, because "Feeser's prices on Serv products were so far out of line with Weis' prices." (¶ 6).

Paul Thuss, another Feeser salesman, averred that he "had to cut [his] margins to as low as 3 percent above book cost, an extremely low profit margin," to make the sale at Perry Dutch Diner. (¶ 3) (brackets added). Robert F. Andrews, a Feeser salesman, stated that he could make the sale at Camp Streamside" only by lowering [his] markup substantially . . . . Sky Brothers offered Serv products to this account at extremely low prices." (Andrews affidavit, ¶ 3) (brackets added). As to another account, Coventry Diner, Andrews said that , "[b]ased on my conversations with Mr. Gresh [the buyer at the diner], I know that whenever I made the sale of Serv products at Coventry Diner, it was only by lowering my markup substantially . . . . " (¶ 6) (brackets added). Emil's Diner was another one of his accounts. He asserted that the "buyer at Emil's notified me that Feeser's prices were too high, even after I reduced my markup." (¶ 8). Finally, the dietician at Laurel Manor Nursing Home told him that "Feeser's prices on Serv products were often so far out of line with what [their] competitors were offering, that it was

necessary to reduce his markup substantially in order to get the sale." (¶ 10) (brackets added). Richard L. Miller, a Juniata salesman, asserted that he knew pricing caused lost sales at Fye's Frosty Kup because Bill Fye, the buyer, would compare his price with one ostensibly written in a book and would inform him that Fye was buying from Weis because of the latter's lower price. (Miller affidavit ¶ 3).

Fed. R. Civ. P. 56(e) provides, in pertinent part, that affidavits submitted in connection with a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Affidavits failing to meet this criteria, such as those containing hearsay, cannot be relied upon in deciding a motion for summary judgment. *See United States v. St. John's General Hospital*, 875 F.2d 1064 (3d Cir. 1989); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279 (3d Cir. 1988). The Fuller, Andrews and Miller affidavits fail to meet this standard because their material allegations are either clearly hearsay, being premised upon what the buyer told them about prices, or it does not affirmatively appear from the affidavit that the statements are based upon personal knowledge.[4] We will therefore disregard this evidence.

***Plaintiffs' Customer Affidavits.***

Plaintiffs have offered the affidavits of buyers for certain of their customers. (Doc. No. 143). Dean Spanos, the

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[4] The declarant would not have to include an explicit statement that the affidavit was based upon personal knowledge but it should at least appear from the substance of the document that it is so based. *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F.Supp. 312 (D. Md. 1983). Thus, we cannot accept Fuller's bald statement concerning the pricing at the Quality Inn because so much other testimony on the same issue is based upon hearsay. We note that the Thuss affidavit is acceptable but does not appear to be probative since all it establishes is that he had to lower his prices to make sales.

owner of the Country Kettle, made the purchasing decisions for the restaurant. His affidavit asserts that the Juniata salesman would reduce his prices on Serv products but still could not meet Weis' or Sky's prices. Specifically, in Mr. Spanos' words: "[E]ven after [the salesman] lowered Juniata's prices, I challenged those prices and showed him that Sky and Weis were charging much lower prices for the same products." (¶ 3) (brackets added). William Kotsalos, the buyer for Bill's Restaurant and Skyline Restaurant, stated that he purchased Serv products from Sky in the mid-1980's rather than Feeser "because Feeser's prices for Serv portion control products were much higher."[5] (Kotsalos affidavit, ¶ 3). Tom Paterekas, the owner and buyer for Keystone Diner, stopped purchasing Serv portion control products from Feeser on a regular basis from 1983 through 1986 "because Weis consistently offered me prices lower than what Feeser was able to offer me." (Paterekas affidavit, ¶ 3). Audrey Clapper, buyer for Sunny Way Diner, stated that from 1984 through 1986, Feeser's prices for Serv products were higher than Sky's prices so consequently she purchased her Serv products from Sky during that period. (Clapper affidavit, ¶ 4). Finally, Theron J. Fox, Jr., buyer for Fox's Family Restaurant, stated that he purchased Serv products from Weis from 1983 through 1986 because Feeser's prices were higher. (Fox affidavit, ¶ 4).

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[5] Serv submitted a subsequent affidavit from Kotsalos on its own behalf, alleging that the prices charged by Feeser on all products, not just Serv, were generally higher than Sky's prices. (*See* Doc. No. 167, Kotsalos declaration, ¶ 1). Not to be outdone plaintiffs' obtained yet another affidavit from Kotsalos qualifying the affidavit he gave to Serv. In his third and final affidavit, Kotsalos explained that the higher prices for non-Serv products were for products of a higher quality than the non-Serv products offered by Sky. (Doc. No. 175, Kotsalos affidavit, ¶ 3) Hence, Kotsalos' second affidavit has been negated and comparison of these products is not helpful in determining why Feeser's Serv pricing was higher than Weis' or Sky's.

Defendant objects to these affidavits because they were all executed upon "knowledge, information and belief" and, as noted, personal knowledge is a requisite for summary judgment affidavits. *See Hlinka, supra.* But, as also already noted, if personal knowledge appears from the face of the affidavit, it will be accepted. *See Copiers, supra.* In the instant case, it is obvious that the affiant buyers had personal knowledge of plaintiffs' and their competitors' pricing. Thus, the affidavits are acceptable as evidence tending to show the possibility that favorable pricing for Weis had aided it in competing against plaintiffs. However, based upon our foregoing discussion concerning the *de minimus* nature of plaintiffs' evidence, we conclude that these affidavits are likewise not probative of competitive injury or injury to the plaintiffs.

***Evidence Concerning Other Disfavored Distributors.***

Plaintiffs argue that other distributors were injured as well. They first point to W. R. Straw, Inc. (W. R. Straw) and the testimony of Joanne Straw, W. R. Straw's Secretary/Treasurer. Straw testified that her company had lost sales of Serv products to Pennsylvania State University because Weis' pricing for that customer was lower than W. R. Straw's cost from Serv. Defendants contend that this testimony is not supportive of plaintiffs because Straw testified that her company was not injured by the Serv pricing, (Doc. No. 132, Straw deposition, p. 31), that it was an isolated incident, (Doc. No. 132, Straw deposition, p. 86), and that Straw's business has been growing steadily, (Doc. No. 132, Straw deposition, p. 90-91).

We reject defendant's arguments. Straw's testimony concerning a lack of injury was not intended to be responsive to the specific question of a Robinson-Patman injury. Despite her statement to the contrary, her testimony also indicates that there was more than one incident. And we have already rejected the argument that business

growth by itself defeats a Robinson-Patman claim. Accordingly, this testimony may be used in plaintiffs' support.

Plaintiffs next discuss R & R Provision Co. (R & R). Joseph Spagnola, a buyer for R & R, executed an affidavit submitted by plaintiffs in their support (Doc. No. 143, Spagnola affidavit, dated February 5, 1988). Paragraph 5 alleges as follows:

> In late 1983, I started getting complaints from our salespeople that they were losing sales of Serv products to Weis Food Service because we were not priced competitively. The salespeople talked to their customers and brought in invoices showing Weis' prices on Serv. The products involved Serv jellies, mustard, ketchup, and syrup—products we regarded as key items comprising 60-70% of our Serv sales.

Spagnola further stated that "Weis' prices to our customers were as low as the prices I was paying Serv." (¶ 6). Spagnola complained but did not receive a satisfactory response. (¶ 7, 8) R & R stopped purchasing Serv products because it could no longer compete with Weis for the sale of Serv products. (¶ 8).

In opposition, defendant obtained their own affidavit from Spagnola. (Doc. No. 130, Spagnola declaration, dated April 22, 1988). This declaration asserts that after R & R stopped purchasing Serv products, it began to purchase portion control products from Portion Pac, Inc. (¶ 2). The paragraph further states:

> The changes in the brand of portion controlled products carried by R&R have done nothing to impair R&R's business. R&R has had largely the same clientele for the past 50 years. On the whole, it sells PPI portion controlled products today to those same customers to whom it previously sold Serv. Therefore, Serv's pricing has not injured R&R's business in any way.

Paragraph 3 asserts that Spagnola has no "specific, firsthand knowledge of" lost R & R sales because of Serv pricing practices.

In reply, plaintiffs have submitted a third declaration from Spagnola. (Doc. No. 143, Spagnola supplemental declaration, dated August 11, 1988). In clarifying certain matters in his Serv declaration, Spagnola states that his salespeople told him that R & R was losing business because its bids were higher than Weis'. (¶ 5). Additionally, "based upon [his] discussions with Frank Scalenghe of Serv, . . . Serv was granting Weis price concessions that were not offered to R & R." (¶ 7) (brackets added). According to the supplemental declaration, his prior statement that R & R had not been injured was intended to convey only his lack of "firsthand knowledge of the specific customers" lost because of the discriminatory pricing. "[B]ased upon the reports [he] received from [his] salesmen, [he] believe[s] that R & R was losing business" to Weis. (¶ 8) (brackets added).

Serv objects to the plaintiffs' Spagnola affidavits on hearsay grounds and once again we must sustain its position. It is evident that the affidavits are based upon what R & R's salespeople told Spagnola. He has admitted that he has no personal knowledge of lost sales. Accordingly, the affidavits cannot be used in support of plaintiffs. We would also add that we consider the portion of the Serv Spagnola declaration dealing with the purported lack of injury to R & R as not probative on the Robinson-Patman issues here.

Plaintiffs also argue that Gardner Good Foods (Gardner), another Weis competitor, has suffered injury by way of lost sales to Tartan, a favored competitor like Weis. In support, plaintiffs rely upon Serv's May 1985 Market Plans, (Doc. No. 148, tab 29), in which Donald Fleishman, formerly Serv's Philadelphia District Sales Manager, concluded that Gardner lost sales to Tartan. Plaintiffs also

refer to Fleishman's deposition testimony discussing Tartan's receipt of a special non-profit bid allowance. (Doc. No. 146, Fleishman deposition at p. 195). This particular page does not establish the time period during which Tartan received the non-profit bid allowance or that this bid allowance was used to take sales away from Gardner. We do not consider this probative evidence of injury to a competitor.[6]

Except for the *de minimus* Straw testimony, evidence from the allegedly disfavored competitions is completely non-probative and does not support plaintiffs. We turn now to plaintiffs' expert testimony and see whether it can support a Robinson-Patman claim under the *Morton Salt* test.

**2. *The Morton Salt Test and the Larner Affidavits.***

Plaintiffs' proof of the *Morton Salt* inference rests upon the affidavit of economist, Robert J. Larner. (Doc. No. 142). Starting with plaintiffs' contention that the price discrimination began in 1982, Larner looked at two, four-year periods, 1979 through 1982 and 1983 through 1986, and observed the percentage change in: (1) Feeser's and Juniata's combined overall sales of all products and (2) their combined Serv purchases. (Id. ¶ 41). He used the following figures. (Doc. No. 142, Exhibit D).

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[6] Defendant submitted the declaration of John Gardner, Gardner's Secretary Treasurer, Director and Buyer, to rebut plaintiffs' claim of injury to Gardner's. (Doc. No. 167, Gardner declaration). This affidavit does not help defendant for the same reason defendant has attacked plaintiff's affidavits. We are not satisfied that it is made on personal knowledge. Additionally, Gardner's overall growth would be irrelevant, for reasons discussed above, for a Robinson-Patman claim.

| YEAR | 1978 through 1982 FEESER AND JUNIATA'S NET SALES | FEESER AND JUNIATA'S SERV PURCHASES |
|---|---|---|
| 1978 | $17,694,177 | $121,742.97 |
| 1979 | 19,305,134 | 146,896.11 |
| 1980 | 22,307,872 | 146,896.11 |
| 1981 | 25,908,481 | 201,127.58 |
| 1982 | 29,528,979 | 242,794.62 |

| YEAR | 1982 through 1986 FEESER AND JUNIATA'S NET SALES | FEESER AND JUNIATA'S SERV PURCHASERS |
|---|---|---|
| 1982 | $29,528,979 | $242,794.62 |
| 1983 | 39,997,581 | 331,973.81 |
| 1984 | 49,254,388 | 395,551.37 |
| 1985 | 57,821,335 | 436,101.79 |
| 1986 | 62,703,435 | 448,268.00 |

He concluded that, for the period 1979 through 1982, the plaintiffs' overall sales increased by 67% and their Serv purchases by 99%. Serv purchases therefore grew 48% faster than overall sales during this four year period. During the period of alleged price discrimination, 1982 through 1986, plaintiffs' overall sales grew by 112% and their Serv purchases by 85%. Therefore, and contrary to the earlier period, Serv purchases grew 24% slower than overall sales during this time. Larner attributed the slower rate of growth to the price discrimination. (Larner affidavit ¶ 43).

Dr. Larner also calculated the number of times Weis, Tartan and Sky received a better price than Feeser and the magnitude of the differential. He concluded as follows:

***FEESER & WEIS***

| Year | Feeser Paid Higher Price than Weis (%) | Feeser Paid Lower Price than Weis (%) | Feeser and Weis Paid Same Price (%) | # of Comparisons |
|---|---|---|---|---|
| 1982 | 51.10 | 14.84 | 34.07 | 182 |
| 1983 | 63.18 | 15.92 | 20.90 | 201 |
| 1984 | 61.00 | 29.88 | 9.13 | 241 |
| 1985* | 66.67 | 23.15 | 10.19 | 216 |

*The 1985 figures include January of 1986.

***FEESER & TARTAN***

| Year | Feeser Paid Higher Price than Tartan (%) | Feeser Paid Lower Price than Tartan (%) | Feeser and Tartan Paid Same Price (%) | # of Comparisons |
|---|---|---|---|---|
| 1984 | 79.38 | 14.4 | 6.23 | 257 |

***FEESER & SKY BROTHERS***

| Year | Feeser Paid Higher Price than Sky Bros. (%) | Feeser Paid Lower Price than Sky Bros. (%) | Feeser and Sky Bros. Paid Same Price (%) | # of Comparisons |
|---|---|---|---|---|
| 1984 | 74.72 | 19.10 | 6.18 | 178 |

(Doc. No. 142, Exhibit B).

**Magnitude of Price Difference**

| | Feeser & Weis | | Feeser & Sky Bros. | | Feeser & Tartan | |
|---|---|---|---|---|---|---|
| Year | % by which Price to Feeser Exceeded Price to Weis | % by which Price to Weis Exceeded Price to Feeser | % by which Price to Feeser Exceeded Price to Sky Bros. | % by which Price to Sky Bros. Exceeded Price to Feeser | % by which Price to Feeser Exceeded Price to Tartan | % by which Price to Tartan Exceeded Price to Feeser |
| 1982 | 0.09 | 0.11 | | | | |
| 1983 | 0.22 | 0.09 | | | | |
| 1984 | 0.15 | 0.15 | 0.24 | 0.07 | 0.20 | 0.12 |
| 1985* | 0.11 | 0.16 | | | | |

*The 1985 figures include January of 1986.

(Doc. No. 142, Exhibit C).

Dr. Larner also studied six products for a six month period from May to October 1984 and concluded that Weis' margins on its sales of the products were greater than the margins plaintiffs were able to achieve. (Doc. No. 142, Exhibits E, F and G).

Defendant Serv attacks Dr. Larner's position on numerous grounds. We deal here only with the major ones. First, defendant contends that Larner has not addressed the relevant economic consideration here, the overall growth of competition in general and of the plaintiffs in particular. We have already rejected defendant's reliance upon *Boise Cascade* for this position.

Second, defendant contests Larner's use of four year periods to establish the slower rate of growth of Serv purchases. Serv contends that the sole reason Larner used these periods was to get the results he wanted and that Larner did not establish a valid basis for choosing the four year periods. We agree with defendant on this point.

The only reason Larner gives for grouping the years by four "is that yearly figures fluctuate substantially for var-

ious reasons." (Doc. No. 178, Larner deposition at p. 160). When questioned why yearly figures would fluctuate, Larner responded: "look at the increase in Feeser and Juniata's net sales over a period and also even its increase in the - .in Feeser's purchases from Serv. Particularly in the later period, there were fairly large increases in Feeser's net sales. Economists typically use data for a longer period than one year in doing analysis or comparisons of performance by different entities." (*Id.* pps. 259-60). When asked whether economists would do that because there would be a greater track record, Dr. Larner responded: "Yes, a greater track record, and you sort of wash out unusual events or the effects of unusual events in one particular year by using an average." (*Id.* at p. 260).

Significantly, Dr. Larner does not elaborate on what these "various reasons," "unusual events" or "effects" might be. A reasonable jury would not accept his conclusory reasoning as a valid basis for using four year periods, especially when the only specific reasons given for lumping the years together are the yearly fluctuations in plaintiffs' net sales and Feeser's purchases from Serv, the very factors which Dr. Larner believes reveal competitive injury but which he simultaneously says must be smoothed over by using only four year increments of time. Four-year periods would also seem to be inappropriate in a price sensitive industry where salespeople are constantly making calls upon their customers. It would seem more likely that price discrimination would appear in the annual figures.

Moreover, Dr. Larner is not consistent in his consideration of annual increases. Serv revised its bid system in March of 1987 so that a distributor had to document the exact nature of the business it was seeking from the institutional food user. Dr. Larner has reviewed sales and purchases for 1987 and has concluded that they support his theory of competitive injury. According to Dr. Larner:

> Under Serv's new pricing scheme, prices to Feeser dropped significantly and the price discrimination in favor of plaintiffs' competitors apparently came to an end. Despite Serv's continuing price discrimination during the first quarter of 1987 and also the presence of lagged effects from the discrimination that occurred in earlier years, I would expect to see some recovery of plaintiffs' Serv business after the discrimination ended. In fact, this is what the 1987 data in the supplemental exhibit show. During the four-year period before significant discrimination, 1979 to 1982, plaintiffs' Serv purchases grew 48 percent faster than their overall sales, while during the four-year period of significant price discrimination, plaintiffs' Serv purchases grew 24 percent more slowly than their overall sales. Once the discrimination ended in 1987, however, plaintiffs' Serv purchases once again began to grow faster than their overall sales. For 1987, plaintiffs' Serv purchases grew at *more than double* the rate of growth of their overall sales (23 percent to 11 percent). This reversal in plaintiffs' relative growth rates following the end of Serv's price discrimination provides strong support for the conclusion that the earlier relative decline in plaintiffs' Serv business was caused by Serv's price discrimination.

(Doc. No. 175, tab 3, Larner affidavit, dated November 17, 1988, ¶ 29) (emphasis in original).

We are not informed why Dr. Larner considers these relative, annual increases in sales and purchases as strong support for the conclusion that price discrimination occurred when he refused to perform the same analysis for the preceding eight years precisely because he felt yearly computations would be worthless.

If we were to follow Dr. Larner's lead, we could, as defendant did, analyze other increases on an annual basis as well. When this is done, it appears that Dr. Larner's analysis is useless for determining price discrimination, injury to competition, or injury to the plaintiffs. For example, as defendant has noted, "between 1979 and 1980, when even plaintiffs concede that there was no price discrimination, plaintiffs' total sales increased about 16%. However, during that same period, Serv purchases by J. F. Feeser *decreased* by 5%[7]. . . . Conversely, between 1982-83, during the period of alleged price discrimination, plaintiffs' total sales increased by 34%.[8] Serv purchases by J. F. Feeser increased by 37%, a greater amount." (Doc. No. 166, Serv's Evidentiary Objections to the Larner affidavit at p. 35) (emphasis in original) (footnotes added). Thus, on an annual basis, these increases and decreases appear during allegedly discriminatory times and non-discriminatory ones. In other words, comparisons between plaintiffs' total sales and their Serv purchases reveal nothing about competitive injury or discriminatory pricing.

Another reason for rejecting this position is that Dr. Larner did not adequately determine that the relative decrease in Serv purchases resulted from discriminatory pricing. Dr. Larner admitted that Feeser and Juniata added product lines between 1982 and 1986 (Doc. No. 178, Larner deposition at p. 266-67). He also thought some lines were dropped but could not say specifically which ones or their volume. (*Id.* at 267). Dr. Larner then stated:

> [A]s I mentioned in the affidavit, I inquired of Feeser management about whether there were any reasons that might explain why despite their Serv business growing faster than their overall business in the earlier period, it grew more slowly

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[7] Our own calculation is 4.35% but the difference is immaterial.

[8] Our own calculation is 35.45%.

> in the later period. I asked could changes in the product mix or customer mix or demand proportion for products explain that change.
>
> I went through my list one by one and discussed each item with them, and they indicated that each of the items I suggested could not be an explanation. I asked them if they had any additional explanation. If anything, I think their thinking was that Feeser's Serv business should have continued to grow even faster than the overall business even allowing for changes.

This represents the sum total of Dr. Larner's attempt to determine other causes for the relative decline in Serv purchases to plaintiffs' overall sales. It is unacceptable. First, it is hearsay, basically an assertion that there could not have been any other reason for the results obtained because plaintiffs told him so. Second, even if we were to accept this hearsay, it is conclusory and gives no underlying facts by which the conclusion can be evaluated. Essentially, Dr. Larner asserts that there were no other causes because there were no other causes.

It would at the very least be important to explore the product line issue. It would have been easy enough to check the addition of any product lines and changes in volume for other, non-Serv products. The significance of product line additions is that they would add to overall sales thereby decreasing the ratio of Serv purchases to total sales without having to rely upon price discrimination as the explanation. The instant case is similar to *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981). In that case, plaintiff attempted to show injury to itself by showing that its gross profits had not grown during the period of price discrimination as much as it had during an earlier period. Rejecting this argument, the court stated:

> This estimate takes no account of changes in costs, in economic conditions, in likely demand, or any of the myriad other economic factors that affect profitability—let alone *growth* in profitability. Indeed, no firm can readily count on a continuous rate of *growth* of profitability; and, there is no basis for assuming a causal relationship between the price differences charged here and a change in that growth rate. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488-89, 97 S.Ct. at 697-98.

*Id.* at 22 (emphasis in original).

We are also not impressed with Exhibit B, a comparison of the pricing Feeser and its alleged favored competitors received on certain comparable products. If Serv had intended to discriminate in favor of Weis, it did not do a very good job of it. In 1982, Feeser paid a higher price than Weis in only 51.1% of the transactions while they both paid the same price 34.07% of the time. The percentages are more supportive for the remaining years but still hardly what one would consider evidence of systematic discrimination, especially when it is reasonable to conclude that an even split in favorable pricing would prove nothing for plaintiff.[9]

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[9] We limited plaintiffs' discovery concerning Tartan and Sky to 1984. (*See* Doc. No. 39, Order, dated April 29, 1986 at ¶ (a)). The figures for these competitors are far more impressive. Feeser paid a higher price than Tartan 79.38% of the time and the same price 6.23% of the time. Feeser paid a higher price than Sky 74.72% of the time and the same price 6.18% of the time.

We discount these figures because plaintiffs have not explored the other relevant years although they could have sought an enlargement of discovery to do so. We recall that, although the order did limit plaintiffs to 1984, it was not conclusive of further discovery concerning third party distributors if the initial discovery was favorable. Plaintiff could have sought a modification of our order. Their failure to marshal

Exhibit C, showing the magnitude of price differences, is equally equivocal. The price differential was against Feeser only in 1983. In that year, when Feeser paid the higher price, it paid 22% more than Weis did. When Weis paid the higher price, it paid 9% more. But the remaining differentials are either even, as in 1984, when both paid 15% more on purchases where they received the worse price, or in Feeser's favor. In 1982, Weis paid 11% more on its disfavored purchases, Feeser 9%; in 1985, Feeser paid only 11% more when it received the worse price, but Weis 16% more when it did so. This evidence does not establish injury or price discrimination.

We also think that defendant is correct in its attack upon Exhibits E and F. Dr. Larner has set forth his calculations for six Serv products for a six month period from May to October of 1984 showing average profit margins for sales by plaintiffs and Weis. Weis' average margins were higher. We reject this evidence because it is an insufficient number of products and, an insufficient amount of time for valid conclusions to be drawn for a Robinson-Patman claim.[10]

### B. *The Sherman Act Claim*

Serv contends that plaintiffs' claim under section 1 of the Sherman Act[11] fails because: (1) just as in the Robin-

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the evidence in their favor, as is their burden on a motion for summary judgment, *see Celotex, supra*, requires us to find against them on this issue.

[10] In other respects, consistent with our discussion above, those paragraphs of Dr. Larner's affidavit relying upon salesmen hearsay, must be rejected.

[11] Section 1 of the Sherman Act provides, in pertinent part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal. . . .

15 U.S.C. § 1.

son-Patman claim, plaintiffs have proved no injury to themselves or to competition; (2) plaintiffs have not shown a conspiracy between Serv and Weis to engage in price discrimination; and (3) in any event, there has been no allegation that defendants acted to exclude competitors from the market. Defendant also argues that discriminatory pricing in violation of the Robinson-Patman Act is not, without more, a violation of section 1 of the Sherman Act.

Based upon the foregoing discussion concerning the Robinson-Patman claim and lack of injury to plaintiffs or to competition, we agree with the first argument. "[N]o difference in the criteria for illegality or the mode of analysis follows from the difference between the 'unreasonable' formula of the Sherman Act and the 'substantial lessening of competition' formula of the Clayton Act." *Black Gold, Ltd, v. Rockwool Industries, Inc.*, 729 F.2d 676, 683 (10th Cir.) (quoting 2 P. Areeda and D. Turner, Antitrust Law ¶ 304a (1978)), *cert. denied*, 469 U.S. 854, 105 S.Ct. 178, 83 L.Ed.2d 113 (1984). *See also Crowl Distributing Corp. v. Singer Co.*, 543 F.Supp. 1033 (D. Kan. 1982).

Next, even were we to assume that a conspiracy existed between Serv and Weis to grant Weis favorable pricing, we also agree with defendant that such a claim in the instant case is, without more, not actionable under the Sherman Act.[12] Generally, a Robinson-Patman claim cannot form the basis of a Sherman Act section 1 claim. *See AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1207 (10th Cir. 1982) ("We do not think section one of the Sherman Act requires the manufacturer to offer the same price to all its customers or even to all in a particular geographic area.") (footnote omitted), *cert. denied*, 461 U.S. 919, 103 S.Ct. 1903, 77 L.Ed.2d 290 (1983); *Zoslaw v. Columbia Broadcasting System, Inc.*, 533 F.Supp. 540 (N.D. Cal. 1980), *aff'd on this ground and remanded*

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[12] It is therefore irrelevant that plaintiffs have not concluded discovery on their Sherman Act claim.

*on others, Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085, 103 S.Ct. 1777, 76 L.Ed.2d 349 (1983).

The Tenth Circuit's *Zoslaw* opinion is instructive. As here, the plaintiffs asserted a section 1 claim based upon a vertical conspiracy. In *Zoslaw*, the conspiracy was between a distributor and a favored retailer. The appellate court stated:

> In essence, appellants suggest that price discrimination between individual buyers and sellers which would ordinarily form the basis of a secondary-line Robinson-Patman case is also a violation of section 1 of the Sherman Act. *Yet the courts have held that such an agreement, without proof of an arrangement to exclude others from the buyer's market does not give rise to a section 1 claim. See e.g., National Tire Wholesale, Inc, v. Washington Post Co.*, 441 F.Supp. 81 (D.D.C.1977), *aff'd*, 595 F.2d 888 (D.C.Cir.1979); *Rutledge v. Electric Hose & Rubber Co.*, 327 F.Supp. 1267 (C.D.Cal.1971), *aff'd*, 511 F.2d 668 (9th Cir.1978).
>
> . . . .
>
> Here appellants presented no evidence of any vertical agreement to exclude competitors. Instead, the record indicates that certain retailers negotiated a favorable price with individual distributors. However, even were we to assume some evidence of an exclusionary effect, we have held that such vertical arrangements are not a *per se* violation of section 1. *See Ron Tonkin*, 637 F.2d at 1382-87; *Gough v. Rossmoor*, 585 F.2d 381, 388 (9th Cir.1978); *Mutual Fund Investors*, 553 F.2d at 626; *Joseph Seagram & Sons, Inc, v. Hawaiian Oke & Liquors*, Ltd., 416 F.2d 71, 78-79 (9th Cir.1969). Therefore such agreements

> do not violate section 1 unless they are found to be unreasonable. [citation omitted]
>
> Here there is simply no indication that the sales agreements between individual distributors and retailers constituted an unreasonable restraint of trade. Indeed, the Supreme Court has recognized that the price discrimination which results where buyers seek competitive advantage from sellers encourages the aims of the Sherman Act, a respect in which the Sherman Act is inconsistent with the aims of the Robinson-Patman Act. *See Great Atlantic &Pacific Tea Co.*, 440 U.S. at 82, 83 n. 16, 99 S.Ct. at 934 n. 16; *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 73-74, 73 S.Ct. 1017, 1024, 97 L.Ed. 1454 (1953).

693 F.2d at 886-87 (footnote omitted) (brackets and emphasis added).

The First Circuit Court of Appeals provided a more elaborate rule of reason analysis in *Monahan's Marine, Inc, v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989). In *Monahan's* the plaintiff boat dealer asserted that the defendant boat builder violated section 1 by selling boats to plaintiff's competitors at lower prices and on better terms. The district court granted summary judgment on the ground that plaintiff had shown only unilateral action on the part of the defendant, thereby failing to meet the concerted action requirement for a section one claim. The appellate court took a different approach in affirming the decision. Noting initially that the "only relevant agreements that the record shows in this case are Whaler's agreements to sell boats to Monahan's competitors at low prices," *id.* at 526, the court concluded that there was no unreasonable restraint of trade. Among other grounds for reaching this result, defendant's prices had not been predatory. Whaler's had not sold its boats below its own cost

so there was no risk of driving non-favored buyers out of business. The court also noted that:

> In the vertical context, the price cutting supplier himself typically has an economic interest in encouraging competition among his dealers, and thus preventing the emergence of any "dealer monopoly." Other things being equal, a profit-maximizing dealer monopolist would set retail prices that, from the supplier's perspective, are too high and unduly restrict the product's sales. To understand just how this is so, *see* P. Areeda, *Antitrust Analysis* ¶ 402 (4th ed. 1988) (ordinarily manufacturers will maximize their profits by encouraging maximum competition among dealers and low retail profit margins). For this reason, the supplier himself often has an incentive to limit the anticompetitive consequences of any selective price cutting.

*Id.* at 526.

The court went on to discuss the Robinson-Patman Act elements of the case.[13] It noted that there was no large dealer being favored and no evidence that smaller competitors were being forced out of the market.

The instant case is similar to the foregoing decisions. Plaintiffs have not charged Serv with predatory pricing. The Sherman Act claim is predicated solely upon their Robinson-Patman claim. That is not enough. For the purposes of our analysis we can even reject defendant's contention that the evidence shows only a " 'garden variety' vendor/vendee relationship", (defendants' brief in support of summary judgment, Doc. No. 128 at p. 66), between Weis and Serv, and accept plaintiffs' detailed characterization of the relationship which includes, among other

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[13] No such claim had been made, however, since all sales had been intrastate.

things, secret pricing for Serv which was deliberately concealed from Feeser. (See plaintiffs' summary judgment opposition brief, Doc. No. 140, at pps. 186-87). Despite plaintiffs' vigorous protestations to the contrary, however, at bottom this claim is nothing more than a charge Serv engaged in a conspiracy to discriminate in favor of Weis, Tartan and Sky Brothers. Plaintiffs' insist that "unlike the cases cited by Serv (Serv Br. at 66, n.68), the Fourth Claim in plaintiffs' Amended Complaint is not simply a price discrimination claim that has been relabelled as a Sherman Act claim." (plaintiffs' summary judgment opposition brief, Doc. No. 140 at p. 187). But their only elaboration of this claim is that "[t]here is already a substantial evidentiary basis from which a jury could reasonably infer the existence of a conspiracy between Serv and Weis to discriminate against plaintiffs and others in the prices charged for Serv products." (*Id.*) This is nothing more than a claim of price discrimination.

It may be that plaintiffs believe that a charge of conspiracy elevates their claim, but we cannot see how a conspiracy to engage in conduct lawful under the Sherman Act is actionable. If the sale of Serv products at discriminatory prices is not a Sherman Act violation, conspiracy to do so cannot be.

> [A] "conspiracy" in violation of the Sherman Act is not established by mere proof of joint undertaking or concerted action. *It requires a combination to accomplish an unlawful purpose* or to accomplish some purpose, not unlawful in itself, by unlawful means. *E.g., United States v. Kissel, supra; Lamp Enterprises, Inc, v. Toledo Blade Co.*, 461 F.2d 506 (6th Cir. 1972); *Standard Oil Company of California v. Moore*, 251 F.2d 188 (9th Cir. 1957); *Lynch v. Magnavox Co.*, 94 F.2d 883 (9th Cir. 1938); *United States v. National Retail Lumber Dealers Ass'n*, 40 F.Supp. 448 (D.Colo.1941).

*Frackowiak v. Farmers Insurance Co., Inc.*, 411 F.Supp. 1309, 1316 (D. Kan. 1976) (brackets added) (emphasis added).

We also add that we see nothing in the record which would justify the plaintiffs' rhetoric concerning the so-called "fraudulent bid system," (plaintiffs' summary judgment opposition brief at p. 38). The memos and the testimony relied upon by plaintiffs indicate at best that the bidding system had simply gotten beyond Serv's control and it was attempting to bring it into line. Thus, Chris W. Sterns, Serv's national sales administration manager, conducted his pricing analysis, (Sterns deposition, doc. no. 146, tab 4), which contrary to plaintiffs' contention, does not establish any grand conspiracy to favor Weis. To the contrary, the analysis showed that every distributor, including Feeser, was receiving favorable pricing from time to time. (*Id.* at p. 60). The memos and correspondence relied upon by plaintiffs are equally deficient. They do not establish that Serv was authorizing Weis, Tartan and Sky Brothers to use discriminatory pricing. Rather, for all that this discovery reveals, these competitors were simply taking advantage of Serv's laxness in enforcing its bid system. (See Doc. No. 148, tabs 4, 5, 15, 17, 20, 21, 22, 23, 24, 30). Illustrative of the situation is a memo from Joseph Bowen, then Serv's vice-president of sales and marketing, dated March 24, 1982, the earliest apparent recognition of the business forces at work shaping Serv's pricing. (Doc. No. 148, tabs 15 and 21). The memo, inspired by "several incidents in recent months," prohibits price exceptions at the regional level and comments as follows (brackets added):

> I realize that competitive conditions have made it seem necessary to react exigently to market conditions; however, current margins (through the first two months our profit is approximately $.26 per case) do not warrant arbitrary stop-gap measures like "$.35 off invoice" or "1-free with 10"

> to placate, in many cases, unsubstantiated offers from demanding, grasping buyers. Let's not forget that we are salesmen and our success has been based on program selling, *not* cut-throat "meet all action" techniques of [other competitors].
>
> Understand, there are *no* price guidelines or leeways within your responsibility area. There is not a day or night that I can't be reached if need be and there *shouldn't* be any situation which a professional, responsible buyer won't let you get back to him on.

The remaining exhibits strike the same tone. A letter, dated March 27, 1984, from Chris Sterns, to Ron Huss, Hunt-Wesson district manager, complained about the size of a bid Huss made on behalf of Weis which enabled Weis to obtain some business at Pennsylvania State University by using previous pricing. (Doc. No. 148, tab 22).

The only inference in plaintiff's favor from this material is that, despite complaints ranging over several years, nothing was done about the pricing system until after this lawsuit was instituted. Plaintiffs' conspiracy theory focuses upon Frank Schalenge "and other Serv executives," (plaintiffs' opposition brief, Doc. No. 140 at p. 39), who are charged with "fraudulently permitting bid prices to be used by other accounts." (*Id.* at p. 41). But the remainder of their argument concentrates upon what Serv's customers were doing. There is no support in the evidence cited by plaintiffs, (*id.* at pps. 41-44), for their argument that Frank Schalenge was untruthful in blaming Weis for the misuse of the bid system or that there was anything fraudulent about Serv's role.

Additionally, the other evidence relied upon by plaintiffs, that Serv was unsuccessfully attempting to raise Weis' prices, (*id.* at p. 44), indicates, contrary to plaintiffs' position, there was no conspiracy. Co-conspirators usually are

not at odds with each other. And that Serv may have eventually given into Weis' demands is not relevant either. *See Monahan's Marine, supra*, 866 F.2d at 529 (the price discrimination that results when buyers seek competitive advantages from sellers encourages the aims of the Sherman Act).

## IV. *Conclusion.*

Plaintiffs had a difficult case to prove here. This was not a prototypical Robinson-Patman action. Generally, the price discrimination is much more apparent and the plaintiff's case is focused upon a particular product. For example, in *Morton Salt, supra*, the discrimination resulted from the manufacturer's decision to grant standard quantity discounts based upon the quantity of table salt purchased.[14] In *Falls City Industries, supra*, the defendant brewery charged its Indiana beer distributors, including the plaintiff, 10 to 30% more than it charged distributors in other states. In *Rose Confections, supra*, a chocolate chip manufacturer absorbed significant freight costs for transportation of chips to the favored buyer's facilities. In *Boise Cascade*, dual distributors which resold 20% of their purchasers at wholesale generally would receive a 5 to 33% discount on office products across the board.

In the instant case, on the other hand, there was no admitted policy of granting discounts to buyers of a certain size. Nor can plaintiffs point to any particular product where Weis consistently received the better price. Indeed, as already noted, Feeser often received a more favorable price than Weis. In this regard, plaintiffs clearly overreach when they assert that the various memorandums they cite reveal a deliberate plan to maintain a fraudulent bid system. None of those memorandums support such a position.

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[14] Certain favored customers, however, also received special allowances. *Morton Salt*, 334 U.S. at 42 and n.5, 68 S.Ct. at 826 and n.5, 92 L.Ed. at 1202 and n.5.

If anything, they support the opposite; that the bid system was out of control and that Serv was trying to restore some order.

There would also have been no reason why Serv should have discriminated against plaintiffs. The purportedly favored distributors, Weis, Tartan and Sky Brothers, were not the big three in the pertinent markets, a classic situation where buyers exert economic pressure upon a seller for favorable pricing. See *Boise Cascade, supra.* Plaintiff Feeser and these distributors were all roughly the same size. If anything, Serv would want to keep them all happy so that no distributor would emerge with significant market power, thereby enabling it to control prices. *See Monahan's Marine, supra.*

Plaintiffs have not met their burden of proof on summary judgment to establish a Robinson-Patman claim or a Sherman Act claim. Summary judgment will therefore be entered on these claims. Defendant has requested that we therefore dismiss the pendent state claims as well. Weis is still a party to this action and the federal claims are still pending against it. But, because the validity of the claims against Weis depend upon the validity of the claims against Serv, we will dismiss those claims against Weis as well. The pendent state claims will also be dismissed. *See Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976).

We see no reason to address plaintiffs' motions to strike the Cruise and Karas affidavits since we have no occasion to consider that evidence on defendant's motion. Those motions will be dismissed as moot. We will also give the same treatment to Serv's various motions to strike plaintiffs' evidence. It is clear from this memorandum what portions of that evidence we considered proper or relevant. We will, however, grant Serv's motion to strike the Kessler affidavit.

We will issue an appropriate order.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: August 4, 1989

## APPENDIX E

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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## CIVIL ACTION NO. 85-0684

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J. F. FEESER, INC., and JUNIATA FOODS, INC.,
*Plaintiffs*

vs.

SERV-A-PORTION, INC., HUNT-WESSON FOODS, INC., and WEIS MARKETS, INC.,
*Defendants*

### ORDER AND JUDGMENT

AND NOW, this 4th day of August, 1989, upon consideration of defendant, Serv-A-Portion, Inc.'s, motion for summary judgment and other outstanding motions, it is ordered that:

1. Defendant's motion for summary judgment is granted.

2. Judgment is hereby entered in favor of Serv-A-Portion, Inc. and Weis Markets, Inc.

3. The pendent state claims are dismissed without prejudice to bringing a state court action.

4. The various motions and cross-motions for sanctions are denied.

5. The various motions to strike are dismissed as moot.

6. Defendant, Serv's, motion to strike the affidavit of Jeffrey Kessler is granted.

7. The Clerk of Court shall close this file.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

## APPENDIX F

The principal statutory provisions involved in this case are Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) and Section 4 of the Clayton Act, 15 U.S.C. § 15. Section 2(a) of the Robinson-Patman Act provides, in relevant part:

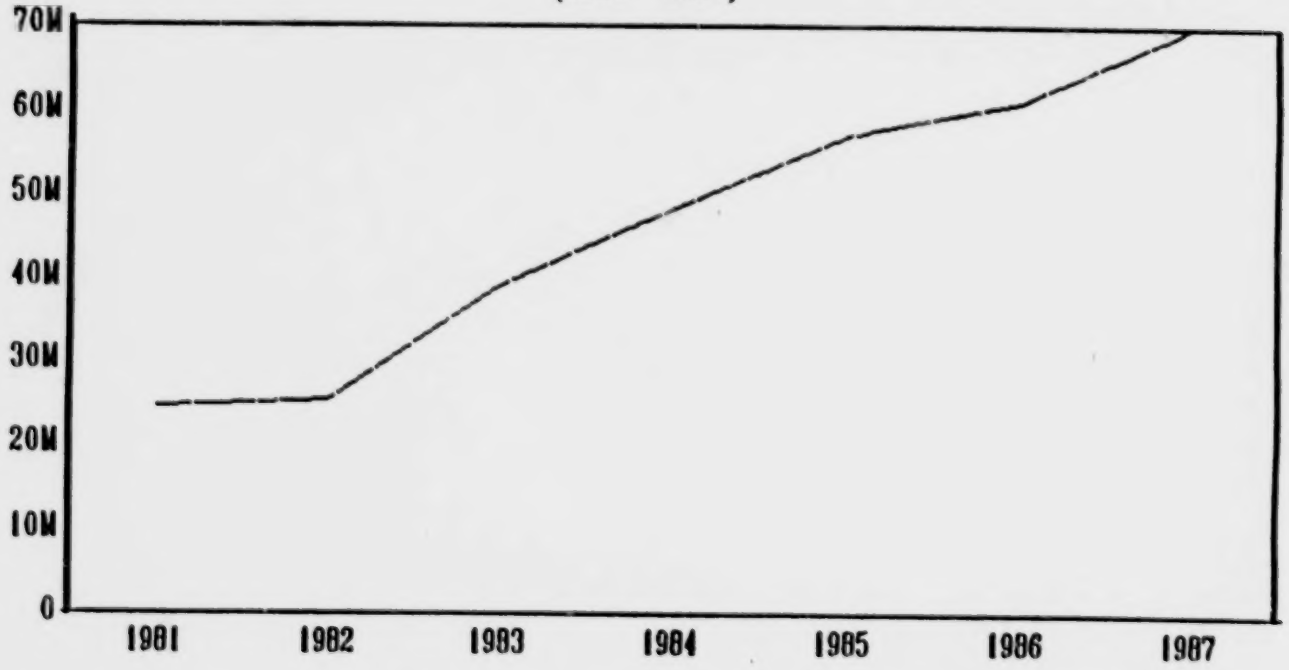
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (as amended 1980) (Supp. 1990), reads in pertinent part:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

# FEESER TOTAL SALES

(1981 - 1987)



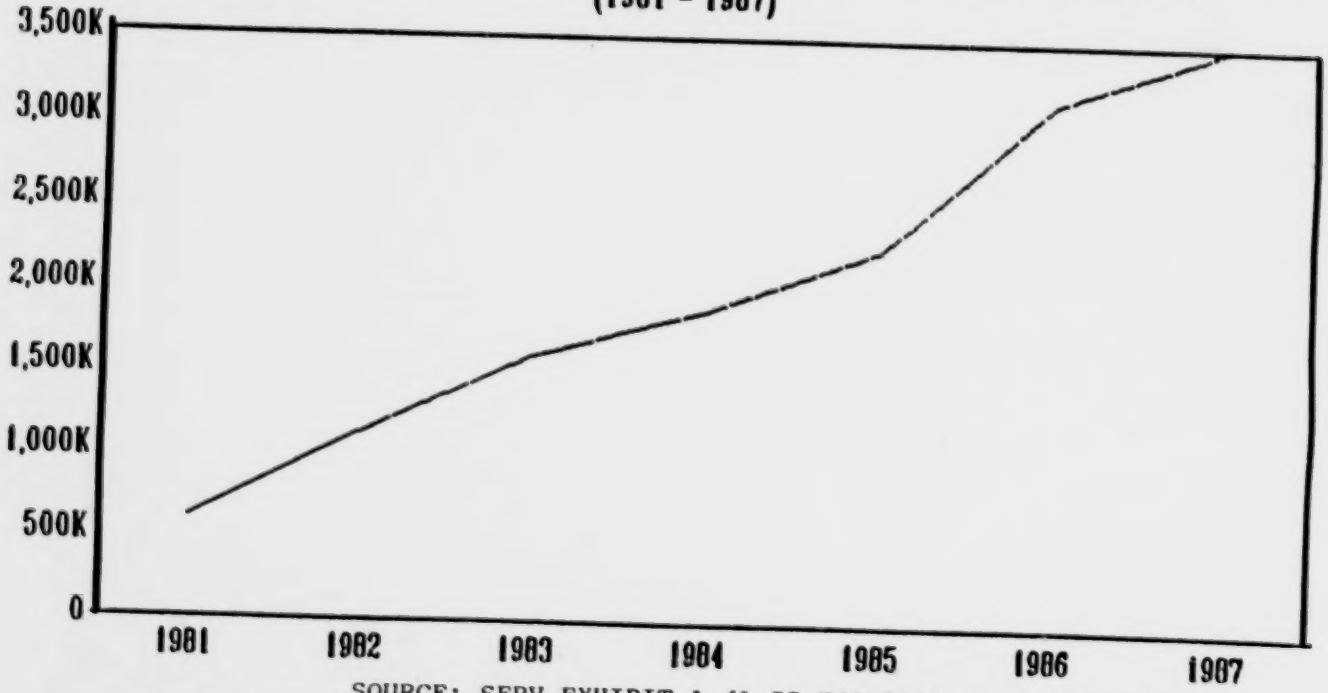

— TOTAL SALES

SOURCE: SERV EXHIBIT 1 (A.II-763-822); KARAS DECLARATION (A.III-937-1199); A.II-731-732

APPENDIX G

# FEESER GROSS PROFIT

(1981 - 1987)




SOURCE: SERV EXHIBIT 1 (A.II-763-822); KARAS DECLARATION (A.III-937-1199); A.II-731-732